A POSTCOLONIAL PERSPECTIVE ON THE STATE'S REGISTRATION OF TRADITIONAL CULTURAL EXPRESSIONS

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Submitted in partial fulfillment of the requirements of the Degree of Doctor of Philosophy

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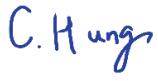

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Abstract

This thesis draws upon postcolonial theory to examine to what extent the state's registration system is an appropriate approach to protecting indigenous people's traditional cultural expressions (TCEs). It specifically includes a case study on the performance of the state's registration system in Taiwan in accordance with Taiwan's Protection Act for the Traditional Intellectual Creations of Indigenous Peoples.

A number of countries have established sui generis systems that provide for registration as a condition of acquiring exclusive rights over registered TCEs. Yet, the state will inevitably involve the legal acknowledgement of TCEs by registration. This mechanism has been criticised because it may manipulate the indigenous people's tradition and identity. This thesis will explore this unresolved issue and expand upon the following research questions: How do we understand the legal protection of TCEs? Is the state's involvement in the protection of TCEs really a negative measure which perpetuates the control over indigenous peoples' cultures? Can registration of TCEs, which is influenced by the colonial history of intellectual property (IP) law and the modern state's colonial control, become a platform for indigenous peoples' negotiation with the state and for protecting TCEs as hybridity?

The research methods are qualitative, beginning with an analysis of the characteristics of TCEs and international negotiations regarding the legal protections of TCEs. Observing Taiwanese indigenous peoples' actions in the process of registration of TCEs, this

research finds that the emphasis of TCEs as hybridity can challenge the Orientalist imagination related to tradition and culture in conventional IP law. Moreover, a well-designed registration system of TCEs can be the platform for indigenous peoples to actively negotiate their cultural and historical perspectives with the modern state.

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Introduction

What? I have barely opened eyes that had been blindfolded, and someone already wants to drown me in the universal? What about the others? Those who "have no voice", those who "have no spokesman"?[1]

-Franz Fanon

Is not ethnocentrism always betrayed by the haste with which it is satisfied by certain translations or certain domestic equivalents? To say that a people do not know how to write because one can translate the word which they use to designate the act of inscribing as "drawing lines," is that not as if one should refuse them "speech" by translating the equivalent word by "to cry," "to sing," "to sigh?"[2]

-Jacques Derrida

Overview of the Problem

This thesis explores whether the registration system can be an appropriate approach to protect indigenous peoples' traditional cultural expressions (TCEs).

In recent decades, discussions about the legal protection of indigenous peoples' TCEs became popular. However, as it is difficult to determine who is the author of a TCE[3] and

[1] Frantz Fanon, *Black Skin, White Masks* (Charles Lam Markmann tr, new edn, Pluto Press 2008) 144.

[2] Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak tr, The Johns Hopkins University Press 1998) 123.

[3] 'One central issue in the debate over the protection of TK and TCEs is the identity of their owners, bearers or custodians.' (See WIPO, 'Intellectual Property and Generic Resources, Traditional Knowledge and Traditional Cultural Expressions: An Overview' (2012) <http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf>.) On the relevant legal issues about the ownership of TCEs, see C Visser, 'Culture, Traditional Knowledge, and Trademarks: A View from the South', in Graeme B Dinwoodie and Mark D Janis, *Trademark Law*

when a TCE was created,[4] the protection of TCEs is often considered problematic in modern intellectual property (IP) law.[5] Therefore, it is largely agreed that the protection of TCEs can be achieved through *sui generis* protection[6] in order to account for their unique legal ideas and treatment that is not altogether consistent with conventional IP frameworks.[7]

In order to establish this special scheme of protection, some countries, including Panama, Peru, and the country that is the particular focus of this thesis, Taiwan adopt a framework that expressly requires registration of TCEs as a condition of protection. Inevitably, legal acknowledgement of TCEs within these countries involves governmental review, examination and registration.

In view of indigenous peoples' long history of being colonised, registration of their TCEs is relevant to at least three dimensions of 'the shadow of colonialism', namely the colonial background of modern IP law, the modern state's colonial control on indigenous peoples,

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and Theory: A Handbook of Contemporary Research (Edward Elgar Publishing 2008) 468; Daphne Zografos Johnsson, 'The Branding of Traditional Cultural Expressions: To Whose Benefit?' in Peter Drahos and Susy Frankel (eds), Indigenous People's Innovation: Intellectual Property Pathways to Development (ANU E Press 2012) 148. For detailed discussions on ownership and authors, see Johanna Gibson, *Community Resources : Intellectual Property, International Trade and Protection of Traditional Knowledge* (Ashgate 2005) 44-53; 79-81. .

[4] On the process of production of traditional knowledge and the incompatibility of TCEs with intellectual property, see Gibson (n 3) 103–123.

[5] Modern IP law has been criticised as 'a potentially unjust generalization of protection, almost inevitably in conflict with indigenous people's needs', ibid, 1. For more on the current debates of the protection of TCEs, see ibid, 1-19.

[6] *Sui generis* means 'of its own kind', and a *sui generis* right is a right designed to address the specific needs of a particular issue. For further discussions, see Section 1.2.

[7] For detailed discussions, see Gibson (n 3) chs 1–3.

and registration of TCEs, which may produce the 'coloniser's gaze'—a term that has come to mean the way the state look at and control indigenous peoples' culture—by emphasising that indigenous peoples' cultures are traditional, primitive or timeless. Therefore, this thesis will explore the following questions: How do we understand TCEs and the state's involvement in the protection of TCEs? Is the state's registration really a negative measure which perpetuates the control over indigenous peoples' cultures? Can registration of TCEs, which is influenced by the colonial history of IP law and the modern state's colonial control, become a platform for indigenous peoples' negotiation with the state and for protecting TCEs as hybridity?[8]

Since the registration system has not been applied on a global scale, it is worthwhile to examine Taiwan's existing legal framework and its practice to help an academic analysis of the questions mentioned above. Furthermore, although the World Intellectual Property Organization (WIPO) has engaged in many discussions regarding registration of TCEs, it has failed to consider Taiwan's experience because Taiwan is ineligible for WIPO membership.[9] Thus, it is hoped that this research will provide new materials to inform further discussions on this issue.

[8] TCEs as hybridity will be discussed in Section 1.3.2.

[9] Taiwan is not a member of the United Nations (UN) or its suborganisations, including WIPO.

Objectives and Scope of Study

This research adopts a postcolonial perspective to discuss the state's registration of TCEs. Moreover, Taiwan is a significant and timely subject for this study as it is an ideal case study to illustrate the practice of the state's registration of TCEs. Taiwan passed the Protection Act for the Traditional Intellectual Creations of Indigenous Peoples (原住民族傳統智慧創作保護條例) ('Protection Act', see: Appendix) in 2007 and adopted a registration system to review and to recognise indigenous people's exclusive rights in TCEs. This thesis collects Taiwan's empirical data to see how indigenous peoples and the Protection Act respond to, or fail to respond to, the colonial shadows in the legal protection of TCEs.

The main objective of this study is to explore the suitability of registration as a condition of granting *sui generis* rights, which follows three main considerations. The first consideration is to explore the shadow of colonialism existing in the making of IP law and in the practice of TCEs as *sui generis* rights. However, the critical analysis of this consideration is not complete if we ignore indigenous peoples' local experience and perspectives. Therefore, the second consideration is to find out Taiwanese indigenous peoples' actions within the process of registration in order to evaluate if the state's registration can be an appropriate approach to protecting TCEs. The final consideration is to suggest a better registration system in Taiwan's context in order to secure indigenous peoples' hybrid TCEs and their negotiation platform with the modern state.

Research Methods and Limitations

This thesis mainly relies on document analysis to discover relevant facts and develop the consequent arguments. WIPO's documents are examined and analysed. Taiwanese indigenous peoples' local experience collected from the anthropological works and the government's data are also consulted in order to strengthen a bottom-up perspective on *sui generis* rights and registration. In addition, this thesis reviews the academic research regarding postcolonial theory, the making of IP law, the legal protection of TCEs and the registration system. Finally, from analysing and interpreting the existing international, regional and national laws along with indigenous peoples' customs, a suggested revision of the Protection Act is proposed.

Postcolonial theory, which mainly focuses on Edward Said's *Orientalism*[10] and Homi Bhabha's *hybridity*[11]in this thesis, is adopted as the theoretical foundation in order to analyse the common misunderstanding of *sui generis* rights and indigenous peoples' negotiation strategy with the modern state. While it is agreed that the operation of modern IP law is relevant to colonialism or neo-colonialism,[12] the binary concept of the

[10] Edward W Said, *Orientalism* (Penguin 2003).

[11] Antony Easthope, 'Bhabha, Hybridity and Identity' (1998) 12 Textual Practice 341; Homi K Bhabha, 'Culture's In-Between' in Stuart Hall and Paul du Gay (eds), *Questions of Cultural Identity* (SAGE Publications 1996); Homi K Bhabha, *The Location of Culture* (Routledge 1994).

[12] For example, Rahmatian contends that 'an essential instrument in the process of neo-colonialization by economic means is the establishment of a legal framework of international trade, which confers legally enforceable rights that support and safeguard economic penetration and control [...] The fairly recent implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is one major device that drives economic neo-colonialism forward, and the process of the making of TRIPS also demonstrates instructively this development.'

dominator/the dominated cannot explain the complicated condition of the international and national debates over IP and TCEs. Postcolonial theory, which tries to go beyond the binary concepts and focuses on hybridity and negotiation of postcolonial culture, is closer to Taiwan's reality. Taiwan's history of being colonised, its special status in the international organisations, and the colonial condition of Taiwanese indigenous peoples are all the subjects which can be explored further through postcolonial theory.

In detail, this study relies on three main resources:

(1) International conventions, reports of international institutions, legislative statues, legal literature and commentaries:

This thesis examines international negotiations regarding the legal protections of TCEs, especially focusing on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Draft Articles and reports prepared by WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)[13]. WIPO has collected legislative statues

See Andreas Rahmatian, 'Neo-Colonial Aspects of Global Intellectual Property Protection' (2009) 12 Journal of World Intellectual Property 40, 42.

[13] The WIPO IGC was established during the 26th WIPO General Assembly, held in Geneva between 25 September and 3 October 2000. The IGC describes its mandate as an 'undertaking [of] text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s), which will ensure the effective protection of traditional knowledge, traditional cultural expressions and genetic resources.' Since its inception, there have been 37 sessions of the IGC with the most recent session taking place between August 27 and 31 2018. In 2014, WIPO General Assembly did not make a decision on the work program of the IGC for 2015, the calendar of provisional dates for the meeting of the principal committees and bodies of WIPO for the year 2015 did not include any sessions of the IGC. The work program of the IGC was back from 2016, and the WIPO General Assembly taking place in October 2017 renewed the mandate of the IGC. In this mandate, the WIPO General Assembly confirms that IGC's work in the 2018/2019 biennium will 'build on the existing work carried out by the Committee, including text-based negotiations, with a primary focus on narrowing existing gaps and reaching a common understanding on core

from different countries, which are abundant resources for comparative analysis of this thesis. Queen Mary's library, IP Archive and electronic journals provide academic resources regarding the analysis of the making of global IP, TCEs and colonialism, and IP's human rights issues.

(2) Field research regarding Taiwanese indigenous peoples' TCEs:

This research refers to ethnographical archives, documentation of indigenous peoples' oral history and anthropological research to gain an understanding of Taiwanese indigenous peoples' TCEs. These documents are varied, from Japan's colonial reports to contemporary legal and anthropological research. Fieldwork reports conducted by indigenous people themselves are especially relevant to this thesis.

(3) Materials regarding Taiwanese indigenous peoples' registration of TCEs:

Taiwan's Project Office of Promoting the Protection Act (The Project Office), sponsored by the government, provides photos and videos, a list of indigenous peoples' applications, and reports of tribal meetings via the Website for the Protection of Indigenous People's Traditional Cultural Expressions (原住民族傳統智慧創作保護資訊網).[14] Additionally, the Project Office has published academic articles and guide

issues, including definitions, beneficiaries, subject matter, objectives, scope of protection, and what TK/TCEs subject matter is entitled to protection at an international level, including consideration of exceptions and limitations and the relationship with the public domain.' see: Assemblies of Member States of WIPO Fifty-Seventh Session, 'Agenda Item 18, Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' (2017) <http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2018-2019.pdf>.

More information on the IGC can be found on its website: <http://www.wipo.int/tk/en/igc/>.

[14] 'The Website for the Protection of Indigenous People's Traditional Cultural Expressions (原住民族傳統智慧創作保護資訊網)' <https://www.titic.apc.gov.tw/> accessed 4 August 2018;

books to help indigenous peoples follow the legal process of applications. It has also held academic seminars and lectures, in which I participated as a member of the audience. Moreover, this thesis observes indigenous peoples' actions from their discussions in the seminars, news reports, television interviews, magazines published by indigenous peoples, the tribe's official website or Facebook page. Empirical data regarding indigenous peoples' registration should be collected from diverse channels, because indigenous peoples' voice is not always represented in the academic journals or mainstream media. Finally, once registered, indigenous peoples' application forms and their attachments are posted on the government's website; thus this study is able to review the original documentation that supports the government's approval of registration.

Since Taiwan is a country implementing registration of TCEs, empirical data and observations collected by this thesis are limited to indigenous peoples' actions in the process of registration and negotiation with the modern state. Therefore, because of lack of empirical evidence, this thesis will not evaluate if the automatic protection of TCEs without registration is better than registration. On the basis of the existence of registration, this thesis examines the modern state's control and the possibility of indigenous peoples' resistance.

Moreover, this thesis cannot totally reject the existing IP law system, though the process of making and negotiating IP law is argued to be influenced by colonialism. On the

'Protection of Indigenous People's Traditional Cultural Expressions (原住民族傳統智慧創作保護基地台)' <http://ctm-indigenous.vm.nthu.edu.tw/> accessed 4 August 2018.

contrary, after acknowledging the colonial background of IP law and *sui generis* rights, this thesis argues a bottom-up improvement with reference to indigenous peoples' customs and experience. This approach also reminds legal researchers that indigenous peoples' perspectives have been ignored for a long time in the area of legal analysis.

Chapter Outlines

This thesis is divided into four parts.

Part one introduces the concepts which will be used throughout this thesis. It includes TCEs, *sui generis* rights and registration. It also describes the hybrid characteristics of TCEs and analyses the postcolonial ideas of hybridity, negotiation, and translation as a critical tool to understand TCEs. Finally, since this thesis will adopt a postcolonial perspective and focus on Taiwan's Protection Act, Taiwanese indigenous peoples' history of being colonised will be briefly introduced.

Part two includes three chapters (Chapters 2, 3 and 4), which argue that three dimensions relevant to the protection of TCEs are under the shadow of colonialism:

Chapter 2 analyses the shadow of colonialism performed in IP law. It points out the colonial background of the making of IP law and examines the influence of Orientalism on *sui generis* rights.

Chapter 3 explores the colonial relationship between the modern state and indigenous peoples. Using Taiwan as an example, it will analyse the state's control of indigenous peoples relevant to protection of TCEs, including (1) the state's control in the naming of indigenous peoples, (2) the official recognition of indigenous tribes, (3) the governmental regulation of tribal meetings, (4) the status of customary law, and (5) the appointment of indigenous peoples' representatives.

Chapter 4 explores the state's registration system of TCEs. Since the *sui generis* regime often provides for registration as a condition of acquiring exclusive rights over registered TCEs, this chapter will first explore what is registration under IP law structure (Section 4.1), and then analyse its criticism regarding the coloniser's gaze (Section 4.2) by examining the process of transforming TCEs from oral culture into written forms (Section 4.3) and electronic forms (Section 4.4).

Part three introduces the details of the Protection Act and indigenous peoples' perspectives relevant to the Protection Act. It aims to analyse how the Protection Act and indigenous peoples' actions can respond to, or fail to respond to, the three dimensions of the shadow of colonialism described in Chapters 2, 3 and 4. Therefore:

Chapter 5 explores the Constitutional promise supporting the Protection Act and tries to reconstruct the meaning of *sui generis* rights. It argues that '*sui generis* rights as

indigenous peoples' parallel sovereignty' may decrease the potential danger these rights face from *Orientalism*.

Chapter 6 uses *Pakedavai*, a noble family of the Taiwanese indigenous tribe and a legally unnamed group, as an example to explore their process of registering TCEs and how they fight against the colonial shadow of the modern state's control.

Chapter 7 responds to the shadow of colonialism in the registration system. By using Pierre Nora's theory of *lieux de mémoire* (sites of memory,)[15] this chapter reviews how Taiwanese indigenous tribes deal with their intangible memory through registration. Seven applications of registering TCEs, which have been approved by the government, will be reviewed to explore indigenous peoples' negotiation with the modern state by means of registration. Furthermore, indigenous peoples' actions show that indigenous peoples' documentation and registration are beyond WIPO's binary distinctions between preservation and IP protection of TCEs and between customary and non-customary use of TCEs.

Part 4 will examine how the efficiency of the government's examination during the process of registration influences applicants' legal rights. It will suggest the revision of the Protection Act and propose the minimum examination model to rebuild the registration

[15] Pierre Nora, 'Between Memory and History: Les Lieux de Mémoire' [1989] Representations 7.

system as a dialogue platform which can recognise indigenous peoples' parallel sovereignty and enforce their real *sui generis* rights.

The thesis is based on the law and materials available as of 10 August 2018.

Part 1: TCEs and Postcolonial Theory

This Part will introduce the main concepts which will be used throughout this thesis, including TCEs, *sui generis* rights, and registration system (see Sections 1.1, 1.2 and 1.3). It uses the postcolonial idea of hybridity to introduce the hybrid characteristics of TCEs and the possibility of indigenous peoples' negotiation with mainstream culture (see Section 1.4). Finally, the Taiwanese indigenous peoples' history of being colonised will be briefly introduced in order to understand the role they played in the interaction with the modern state and registration of TCEs (see Section 1.5).

1 Concepts and Perspectives

1.1 Traditional Cultural Expressions

In recent decades, WIPO has emphasised the importance of preserving and protecting indigenous people's traditional knowledge (TK) and TCEs. In an effort to achieve such protection the IGC, over the course of more than twenty sessions, has prepared (and continues to work on) draft articles for the protection of TK,[1] TCEs[2] and genetic resources.[3] WIPO attributes the need for protection to the intrinsic 'social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values' of such

[1] WIPO, 'The Protection of Traditional Knowledge: Draft Articles WIPO/GRTKF/IC/34/5' (2017).

[2] WIPO, 'The Protection of Traditional Cultural Expressions: Draft Articles, Rev.2 WIPO/GRTKF/IC/34/6' (2017).

[3] WIPO, 'Consolidated Document Relating to Intellectual Property and Genetic Resources WIPO/GRTKF/IC/34/4' (2017).

knowledge.[4] It also acknowledges that TCEs 'constitute frameworks of innovation and creativity that benefit Indigenous [Peoples], [local communities] [and nations] / beneficiaries, as well as all humanity'.[5]

The definition of TCEs is prescribed in WIPO's Protection of Traditional Cultural Expressions: Draft Articles Rev. 2, 2017 ('The WIPO Draft Articles'):

> Traditional cultural expression means any form of [artistic and literary], [other creative, and spiritual,] [creative and literary or artistic] expression, tangible or intangible, or a combination thereof, such as actions , materials , music and sound , verbal and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms],that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities; that are the unique product of and/or directly linked with and the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities; and that are transmitted from generation to generation, whether consecutively or not. Traditional cultural expressions may be dynamic and evolving.[6]

An alternative definition is provided in the same Draft Articles, emphasising the dynamic characteristics of TCEs:

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[4] WIPO, 'The Protection of Traditional Cultural Expressions: Draft Articles, Rev.2 WIPO/GRTKF/IC/34/6' (n 2) Annex 2.

[5] ibid 2.

[6] WIPO, 'The Protection of Traditional Cultural Expressions: Draft Articles, Rev.2 WIPO/GRTKF/IC/34/6' (n 2), Article 2.

> Traditional cultural expressions comprise the various dynamic forms which are created, expressed, or manifested in traditional cultures and are integral to the collective cultural and social identities of the indigenous local communities and other beneficiaries.[7]

The WIPO Draft Articles provide some examples to explain 'actions', 'materials', 'music and sound', and 'verbal' for the first definition. Actions are exemplified as 'dance, works of music, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed'. Materials means 'such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.' Music and sounds include 'songs, rhythms, and instrumental music, the songs which are the expression of rituals.' Finally, verbal means 'such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.'[8]

In Taiwan, a *sui generis* regime of protecting TCEs has been established by the enactment of the Protection Act for the Traditional Intellectual Creations of Indigenous Peoples (the 'Protection Act'). According to Article 3 of the Protection Act, TCEs refer to 'traditional religious ceremonies, music, dance, songs, sculptures, weaving, patterns, clothing, folk crafts or any other expression of the cultural achievements of indigenous peoples.' By using 'any other expressions of the cultural achievements', the legislators try to use the broadest definition in order to recognise the diversity of cultural expressions. As 'dynamic'

[7] ibid, Article 2.

[8] ibid, notes 1-4.

and 'diverse' are often mentioned in the definition of legal documents relevant to TCEs, a single definition becomes difficult, so the legal documents usually provide examples of TCEs or describe their characteristics instead. In this thesis, the characteristics of TCEs will also be further analysed in Section 1.3 and Chapter 7. In addition, examples of TCEs will be found in Taiwanese indigenous peoples' abundant applications for registration, which will be analysed throughout this thesis.

1.2 *Sui Generis* Rights and Registration

As previously mentioned, it is difficult to determine who is the author of a TCE and when a TCE was created, so the protection of TCEs is often considered problematic in modern IP law. A number of countries and model laws have developed *sui generis* rights for the protection of TCEs.[9] In *A Dictionary of Intellectual Property Law*, *sui generis* is defined as:

> Latin, 'of its own kind'. Applied, in the context of intellectual property, to a right designed to address the specific needs of a particular issue, such as the right referred to in UK legislation as 'database right' but called (rather ambiguously) 'sui generis right' in the EC Directive which created it.[10]

[9] For example, Peru, Panama and Taiwan adopt *sui generis* rights. The international model laws which support *sui generis* rights are (1) Model Provisions of the UNESCO/WIPO which were created in 1982 (2) the South Pacific Model Law for National Laws of 2002 (3) the Tunis Model Law on Copyright for Developing Countries of 1972, (4) the WIPO Draft Articles and (5) the ARIPO Provisions of 2010. See Kilian Bizer and others, 'Sui Generis Rights for the Protection of Traditional Cultural Expressions Policy Implications' (2011) 2 Journal of Intellectual Property, Information Technology and E-Commerce Law 114, 115.

[10] Peter Groves, *A Dictionary of Intellectual Property Law* (Edward Elgar Publishing Ltd) 298.

Therefore, the *sui generis* right of TCEs 'falls outside the traditional patent, trademark, copyright, and trade-secret doctrine'[11] and implies that such legal protection is 'special' or 'exceptional'. In the issue of protecting TK and TCEs, the tension between 'conventional IP' and '*sui generis* IP' approaches is often assumed.[12] Therefore, it is largely agreed that the protection of TCEs can be achieved through *sui generis* protection in order to account for their unique legal ideas and treatment that is not altogether consistent with conventional IP frameworks.[13] Sometimes the concepts of justice and development are discussed in the *sui generic* regime of TCEs, as *sui generis* rights may recognise the special position of indigenous peoples, when considering the 'history of colonialism, dispossession, and the past (and continuing) injustice and marginalisation' of indigenous peoples.[14]

In order to establish this special scheme of protection, 'formalities' of the *sui generis* protection of TCEs are often discussed by international and regional IP law institutions. WIPO defines the term 'formality' as 'a procedural or administrative requirement, such as placing a copyright notice, deposing copies or registration, be to fulfilled as condition for

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11 Daniel F Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge 2017) 352.

12 Wend Wendland, 'The Evolution of the IGC from 2001 to 2016: An Insider's Perspective' in Daniel F Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge 2017) 35.

13 Robinson, Abdel-Latif and Roffe (n 11) 352. For detailed discussions, see Johanna Gibson, *Community Resources : Intellectual Property, International Trade and Protection of Traditional Knowledge* (Ashgate 2005) chs 1–3. Also see: Alpana Roy, 'Intellectual Property Rights: A Western Tale' (2008) 16 Asia Pacific Law Review 219.

14 Natalie Stoianoff and Alpana Roy, 'Indigenous Knowledge and Culture in Australia - The Case for Sui Generis Legislation' (2015) 41 Monash University Law Review 745, 782.

the acquisition, enjoyment and exercise (including the enforceability) of copyright or related rights.'[15] In the discussion of protection of TCEs, WIPO suggests that the framework of protection may:

(1) Provide that protection does not require formalities;

(2) Establish registries or databases, but not link them to the acquisition of rights;

or

(3) Expressly require registration of the TK or TCE as a condition of protection.[16]

These three models are recommended by, and used in, different countries and international documents. For example, the first approach, which does not require formalities, was adopted by the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 (the 'Pacific Model Law'). As *the Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law 2002* ('Guidelines of the Pacific Model Law') explain, 'protection is provided automatically without formalities so that it is available as of the moment an expression is created, similar to copyright… examples of this approach include the Pacific Model Law 2002'.[17]

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[15] WIPO, 'Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (WIPO/GRTKF/IC/29/INF/7)' (2015) 16.

[16] WIPO, 'International Symposium, Intellectual Property and Sustainable Development: Documentation and Registration of Traditional Knowledge and Traditional Cultural Expressions, Background Paper' WIPO/TK/MCT/11/INF/2' (2011).'

[17] Secretariat of The Pacific Community, 'Guidelines for Developing National Legislation for the Protection of Traditional Knowledge and Expressions of Culture Based on the Pacific Model Law 2002' (2006).

The second approach is registration as a declaratory regime. Although declarative registers do not influence the existence of the rights of TK and TCEs, they can support the examination and challenge of prior art with regard to patents and facilitate benefit-sharing between potential users and holders of TK/TCEs.[18] This approach reflects the principle that TCEs should be protected without formality and simultaneously provides the possibility of registration or notification for the TCEs in order to respond to the administrative control related to conventional IP. It can also create 'a hybrid of automatic protection and registration' and 'provide different treatment for different layers' of TCEs.[19]

The third approach is the constructive registration regime, requiring that the rights are claimed and created through registration. The most famous example of this can be found in Panama Act No. 20, 2000 in which Article 7 set out, 'The Departamento de Derechos Colectivos y Expresiones Folclóricas (Department of Collective Rights and Expressions of Folklore), through which shall be granted, inter alia, the registration of the collective rights of indigenous peoples, is hereby created within DIGERPI (annotation: the Directorate General of Registration of Industrial Property of the Ministry of Commerce and Industry)'. It adopts a special registration system whereby the rights do not exist until they are registered in the government archives.

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[18] UNU-INS Report, 'The Role of Registers & Databases in the Protection of Traditional Knowledge: A Comparative Analysis' (UNU-INS 2004) 32 <http://www.iapad.org/wp-content/uploads/2015/07/Protection-of-TK.pdf>; Robinson, Abdel-Latif and Roffe (n 11) 351–352.

[19] 'Guidelines for Developing National Legislation for the Protection of Traditional Knowledge and Expressions of Culture Based on the Pacific Model Law 2002' (n 17).

If the second or the third approach is adopted to build the systems of protecting TCEs, the government will play a crucial role in deciding which TCEs are protected by law and which are not. The third approach requires the state's involvement in particular because the condition of protection of the TCEs is wholly dependent on the state's review and registration.

This thesis uses a postcolonial perspective to explore the state's registration as an approach to granting the rights of indigenous peoples' TCEs. In doing so, attention is paid to the third approach which has been adopted in several countries, including Panama, Peru, and the country that is the particular focus of this study, Taiwan. Inevitably, the legal acknowledgement of TCEs in these countries involves governmental review, examination and registration, which has faced some critical challenges.[20] Therefore, this research will research the criticism related to the modern state's involvement in recognising indigenous people's rights and observe the interaction between the state and indigenous peoples by using Taiwan's register of TCEs as a case study.

In WIPO IGC's negotiations, the question of formalities remains unsettled. According to Article 7 of the WIPO Draft Articles, the IGC offers two options for member states' discussions but has not reached a final conclusion on whether member states should

[20] WIPO, 'Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (WIPO/GRTKF/IC/29/INF/7)' (n 15) 35; UNU-INS Report (n 18) 32. In Taiwan's context, see Kai-Shyh Lin, 'Using Intellectual Property Rights to Protect Indigenous Cultures: Critique on the Recent Development in Taiwan' [2007] Journal of Archaeology and Anthropology 185.

subject the protection of TCEs to any formality.[21] Therefore, focusing on the analysis of constructive registers will provide some insight into regional and international negotiations with regard to the formalities of *sui generis* protection of TK and TCEs.

1.3 Characteristics of Traditional Cultural Expressions

Before analysing the state's registration system for the protection of TCEs, it is necessary to understand the key characteristics of TCEs. Examining the nature of TCEs can aid in an evaluation and reconsideration of the suitability of *sui generis* rights and the state's registration of TCEs.

When researchers introduce the protection of TCEs into the modern IP system, they tend to consider TCEs as 'a part of IP' or as 'the opposite of IP'. This attitude of either similarity or dichotomy regarding the place of TCEs in the IP law system is briefly introduced in Section 1.3.1. However, I contend in Section 1.3.2 that the legal issues surrounding TCEs are complex precisely because TCEs demonstrate 'hybrid' characteristics.

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[21] WIPO, 'The Protection of Traditional Cultural Expressions: Draft Articles, Rev.2 WIPO/GRTKF/IC/34/6' (n 2), Article 9:

Option 1

9.1 [As a general principle,] [Member States]/[Contracting Parties] [should]/[shall] not subject the protection of traditional cultural expressions to any formality.

Option 2

9.1 [[Member States]/[Contracting Parties] [may] require formalities for the protection of traditional cultural expressions.]

9.2 Notwithstanding Paragraph 1, a [Member State]/[Contracting Party] may not subject the protection of secret traditional cultural expressions to any formality.

1.3.1 The Entanglement of Dichotomy and Similarity

Dichotomy and similarity are simultaneously applied when lawmakers interpret the protection of TCEs into the modern IP system.

1.3.1.1 Dichotomy

It is often considered that modern IP and TCEs are legal ideas in opposition, as there are many legal separations between IP and TCEs. For instance, TCEs are regarded as the opposite of IP in the area of copyright, no matter if TCEs are protected by law or not:

(1) Public Domain as the Opposite of IP

According to James Boyle's definition of the public domain: 'The public domain is material that is not covered by intellectual property rights,'[22] the public domain is often regarded as 'the opposite of IP'.[23]

Except for being granted some form of protection, TCEs are often regarded as raw materials in the public domain.[24] As WIPO notes, 'copyright requires the

[22] James Boyle, *Public Domain: Enclosing the Commons of the Mind* (Yale University Press 2008) 38.

[23] Stephen R Munzer and Kal Raustiala, 'The Uneasy Case for Intellectual Property Rights in Traditional Knowledge' (2009) 27 Cardozo Arts & Entertainment Law Journal 37, 41, note 7.

[24] There are some states, indigenous and local communities and other stakeholders who suggest that copyright law is limited in its potential for protecting TCEs (WIPO, 'Consolidated Analysis of The Legal Protection of Traditional Cultural Expressions WIPO/GRTKF/IC/5/3' (WIPO 2003).) Also see: WIPO/GRTKF/IC/3/11 (Document submitted by the European Community and its Member States); WIPO/GRTKF/IC/1/5 (Document submitted the Group of Countries of Latin America and the Caribbean (GRULAC)); Responses to the folklore questionnaire (WIPO/GRTKF/IC/2/7) and the TK survey (WIPO/GRTKF/IC/2/5) of Australia, Bhutan, Hungary,

identification of a known individual creator or creators. It is difficult, if not impossible, to identify the creators of traditional cultural expressions because they are communally created and held and/or because the creators are simply unknown.'[25] Therefore, TCEs are excluded from the protection of copyright law.

Although WIPO has noted that 'the public domain is not necessarily the opposite of property',[26] it uses this discourse to emphasise that the public domain is a resource supporting private property. WIPO argues that 'innovation captured as private property depends upon the existence of a rich public domain.'[27] Therefore, 'the public domain is not simply the residue of what is not protected by IP: the public domain is itself a valuable resource.'[28] However, even though the public domain is recognised as rich and robust, it is still supposed to be an area outside private property.

(2) Sui Generis Rights as the Opposite of IP

Indonesia, New Zealand, Norway, Panama, Peru, the Philippines, Republic of Korea, Samoa, Singapore, the Solomon Islands, Viet Nam and others.

[25] WIPO, 'Consolidated Analysis of The Legal Protection of Traditional Cultural Expressions WIPO/GRTKF/IC/5/3' (WIPO 2003) 36. The romantic author is as individual, also see: Rosemary J Coombe, 'The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy' (1993) 6 Canadian Journal of Law & Jurisprudence 249, 250; Patrick J O'Keefe, 'Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era' (1995) 4 International Journal of Cultural Property 388, 390; Susan Scafidi, 'Intellectual Property and Cultural Products' (2001) 81 Boston University Law Review 793, 803–809; Jessica Christine Lai, *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* (Springer International Publishing 2014) 61.

[26] WIPO, 'Note on the Meanings of the Term "Public Domain" in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore (WIPO/GRTKF/IC/17/INF/8)' (2010) 2.

[27] ibid.

[28] ibid.

Even though there are an increasing number of discussions to create the *sui generis* protection of TCEs and restrict the use and misuse of TCEs, conventional copyright and TCEs are still opposing legal ideas. For instance, there is the problem of the 'duration' of protection (and the limited protection period for copyright). Unlike conventional copyright, the protection period for TCEs is often requested to be perpetual. A further concern is that of authorship. While copyright is attributed to the individual creator(s), TCEs are supposed to be owned collectively by a group, a tribe or a people.

In both situations mentioned above, TCEs are marked as the opposite of IP and 'the other' (as what the Western **is not**)[29] under the structure of the conventional IP law.

1.3.1.2 Similarity

Although the legal ideas of modern IP and TCEs are often dichotomous, some governments and international IP forums have begun to use a legal structure similar to IP law to protect TCEs. For example, the governments of Panama and Taiwan have adopted similar legal procedures in their registration of TCEs and patents.[30] Applications are

[29] In Edward Said's *Orientalism*, the Other is what the Western is not; indeed, Said quoted the comment of Lord Cromer, the British Proconsul-general for the British occupation of Egypt between 1877-1907: 'I content myself with noting the fact that somehow or other the Oriental generally acts, speaks, and thinks in a manner **exactly opposite to** the European'. (Edward W Said, *Orientalism* (Penguin 2003) 39. (Emphasis added.) Edward Said emphasises 'the West's binary construction of the Orient as Europe's inverse or "Other", as what Europe is not, in the development of the colonial discourse of European superiority', see: Diane Otto, 'Postcolonialism and Law?' (1999) 15 Third World Legal Studies: vii, viii. For more discussions about Orientalism and the Other, see Chapter 2.

[30] For example, Article 7 of Panama Law No.20 prescribes, 'The Departamento de Derechos Colectivos y Expresiones Folclóricas (Department of Collective Rights and Expressions of Folklore), through which shall be granted, inter alia, the registration of the collective rights of indigenous peoples, is hereby created within DIGERPI'. Article 6 of the Protection Act demands that 'the

reviewed, approved and published under the control of the administrative agency. Gibson also describes the many legal attempts to create effective protection for TK according to IP models and the principles of ownership and property.[31] WIPO has focused on various platforms (biodiversity, food and agriculture, human rights) related to TK and TCEs within the framework of international IP law.[32]

Currently, some scholars even argue that more IP rights should be created to meet the demand for the protection of TCEs. For example, Sunder argues that in order to protect the interests of indigenous and other local communities, TK should be constructed and recognised by law as IP rather than as raw materials.[33] Sunder also provides India's efforts as an example. India's Geographical Indication of Goods (Registration and Protection) Act of 1999 provides the registration system of geographical indication protection, especially for India's agricultural products and handicrafts.[34] The anthropologist Manuela Carneiro da Cunha also argues that anthropologists should support the recognition of IP rights for indigenous peoples' knowledge even though the

applicant for any intellectual creation shall provide a written application, a specification, necessary graphics, images and related documents or provide audio-visual creations in order to apply for registration with the competent authority'. Article 9 provides that 'For intellectual creations, registries shall be established by the competent authority and notices shall be issued. Any creation recognized as an intellectual creation by the competent authority… and approved for registration shall be published in the government gazette and made public on the Internet. The competent authority shall issue an intellectual creation exclusive user certificate and certification marks'.

[31] Gibson (n 13) 101.

[32] ibid 75–76.

[33] Madhavi Sunder, 'The Invention of Traditional Knowledge' (2007) 70 Law and Contemporary Problems 97, 100.

[34] Madhavi Sunder, 'IP³' (2006) 59 Stanford Law Review 257, 298.

idea of Western property cannot perfectly contain the diverse and dynamic indigenous knowledge.[35]

Since the number of attempts to borrow more from IP models to reshape the legal concepts of TCEs (which have typically been regarded as 'the other' of IP) has increased, and the diverse dimensions of TCEs have been gradually clarified by indigenous peoples' participation in IP forums, the entanglement of dichotomy and similarity has given rise to the main idea suggested by this thesis: TCEs as hybridity.

1.3.2 TCEs as Hybridity

I argue that the legal issues surrounding TCEs have 'hybrid' characteristics. TCEs are neither identical to, nor opposite from, IP. Their hybrid characteristics can be identified at least in three layers: subject matter, holders and the protections of TCEs.

1.3.2.1 Hybrid Subject Matter: Disruption of Traditional and Modern

It is difficult simply to draw a line and separate the traditional from the modern. In fact, tradition is not old and fossilised; it is dynamic and cultivated from modern knowledge. TCEs are passed from generation to generation, but there are also 'contemporary expressions of traditional culture, which are constantly recreated, reinterpreted and

[35] Marilyn Strathern and others, 'Exploitable Knowledge Belongs to the Creators of It: A Debate' (1998) 6 Social Anthropology 109, 113–115.

adapted by traditional communities and artists in response to their environment.'[36] WIPO also suggests that '"traditional" means that the traditional knowledge or cultural expressions are developed according to the rules, protocols and customs of a certain community, and not that they are old'.[37]

In Taiwan's context, Kai-Shih Lin, an anthropologist who researches the indigenous people of Taiwan, observes Taiwanese indigenous peoples' attitudes towards their own TCEs in his field research and suggests that they do not see their TCEs as their 'tradition' and that their cultural creations are often the result of synthesising various cultural elements from different cultural sources. Lin explains:

> Many of them [indigenous people] are aware of the fact that their cultural creations are often the result of synthesizing various cultural elements from different cultural sources, including the arts of other indigenous groups in Taiwan, Chinese folk art, Austronesian arts in the South Pacific, or even African art, and that their cultural products can hardly be called 'traditional' in the eyes of their fellow tribe members.[38]

The example of *Bunun*[39]'s traditional costume presents the hybrid characteristic of

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[36] Daphne Zografos, *Intellectual Property and Traditional Cultural Expressions* (Edward Elgar Publishing 2010) 4.

[37] WIPO, 'Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (WIPO/GRTKF/IC/29/INF/7)' (n 15) 38.

[38] Lin (n 20).

[39] Bunun is the fourth largest indigenous people among 16 different indigenous peoples in Taiwan. The population of Bunun is around 58,336. The Bunun people are famous for their *pasibutbut*, the unique "eight-part" polyphonic singing (八部合音), which is sung during *Bunun*'s annual Millet Harvest Ceremony by six male members of the Bunun tribe. See: The Council of Indigenous Peoples, 'Bunun: Introduction' (*The Council of Indigenous Peoples*, 02 2010)

tradition and modern. The continuous transformation of *Bunun* costume is examined in this section to show the hybrid style of so-called 'traditional' costumes of indigenous peoples.

First of all, the exotic image of Formosans was represented in the seventeenth century (see Figure 1). From the seventeenth century to 1945, Europeans called Taiwan 'Formosa', and 'Formosans' refers to indigenous people living in Taiwan.[40] Figure 1 is a painting by Caspar Schmalkalden, who was a European sailor travelling to Taiwan; it portrays indigenous people's clothing and life style.[41] The painting failed to portray the real details of indigenous people, but the Orientalist imagination can be observed.[42] For instance, the nudity of Formosans was emphasised, as this was an important symbol of the 'uncivilised' for the coloniser.[43] In addition, hunting deer was considered to be an essential part of

<https://www.apc.gov.tw/portal/docList.html?CID=274BE22984C1B432> accessed 10 July 2018; Rung-Shun Wu, 'Hazard or Deliberate：Toward the Harmonic Phenomenon and Throat Singing of the Bunun's Pasibutbut (偶然與意圖：論布農族 pasibutbut 的「泛音現象」與「喉音唱法」)' (2004) 140 Journal of Aesthetic Education 14, 14; 'IB Music Investigation: Taiwan Aboriginal and Western Renaissance Music' (*IB Music Investigation: Taiwan aboriginal and Western Renaissance music*, 23 January 2015) <https://ibmusictc.wordpress.com/introduction-to-the-bunun-pasibutbut/> accessed 10 July 2018.

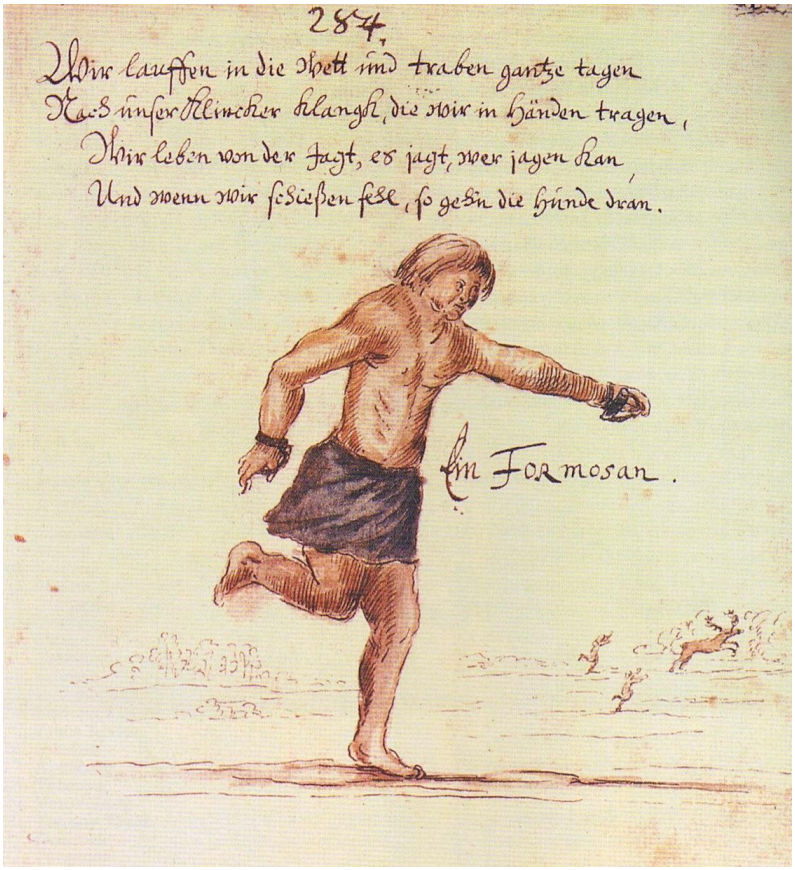
40 Pei-te Kang, 'Historical Materials and Perspectives Regarding the Dutch Colonisation in Taiwan (荷政時代的原住民史料與史觀)' (2015) 24 Journal of Indigenous Documents (原住民族文獻) n 16.

41 National Museum of Taiwan History, 'A Pingpu Man Chasing the Deer (平埔西拉雅原住民奔跑逐鹿圖)' (*Taiwan's Story*) <http://the.nmth.gov.tw/nmth/zh-TW/Item/Detail/f7227457-7982-40ec-9bb4-78e473d874d5> accessed 20 November 2017.

42 Chia-yu Hu, 'Museums, Anthropology, and Exhibitions on Taiwan Indigenous Peoples: The Historical Transformation on Settings of Cultural Representation (博物館、人類學與台灣原住民展示—歷史過程中文化再現場域的轉形變化)' (2006) 66 Journal of Archaeology and Anthropology (考古人類學刊) 94, 96–97.

43 Pei-te Kang, *Colonial Imagnation and Local Ambiguity: Vereenigde Oostindische Compagnie and Taiwanese Indigenous People (殖民想像與地方流變：荷蘭東印度公司與臺灣原住民)* (2016) 35.

Formosan life, as the Dutch described the spectacular abundance of deer in Taiwan in the Dutch colonial period: 'sometimes two or three thousand in a flock together.'[44]



(Figure 1: 'The Formosan Running after the Deer', from Caspar Schmalkalden, 'Die Wundersamen Reisen des Caspar Schmalkalden nach West- und Ostindien 1642–1652'[45].)

Figure 2 is posted on Taiwan's governmental website of arts education for demonstrating traditional *Bunun* costumes.[46] But in fact, the 'traditional' can only be traced back to the

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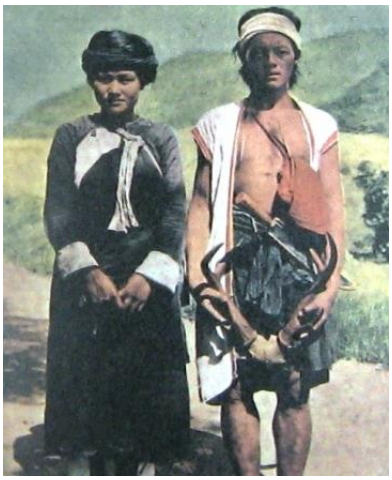
[44] Tonio Andrade, *How Taiwan Became Chinese: Dutch, Spanish, and Han Colonization in the Seventeenth Century* (Columbia University Press 2008) para 20 of Chapter 1.

[45] Gebundene Ausgabe, *Die Wundersamen Reisen Des Caspar Schmalkalden Nach West- Und Ostindien 1642-1652* (1987).

[46] National Taiwan Arts Education Center, 'Arts Education: Bunun People (城鄉藝術活動：布農族)' (*Arts Education and Indigenous Tribes*) <http://ed.arte.gov.tw/CCDA/page_bunun.aspx> accessed 20 November 2017. For a discussion of anthropological photography conducted by the Japanese colonial government in Taiwan, see: Wei-chi Chen, 'Photography as Ethnographic Method: The Anthropological Photographic Archives in Japanese Colonial Taiwan (攝影作為民族

1900s, because the photos of *Bunun* costume were not collected until the Japanese colonial period (1895–1945).[47] Generally speaking, traditional *Bunun* costume is simple and plain, especially compared with the other indigenous tribes in Taiwan.[48]



(Figure 2: an old picture of *Bunun* couple in the Japanese colonial period, from the East Asian Image Collection, Skillman Library at Lafayette College[49].)

However, the traditional costume is always under a process of transforming.[50] Figure 3 is the *Bunun* traditional costume documented in 2008 by Digital Archives of Indigenous Peoples' Traditional Culture, Hualian County. It shows huge differences from Figure 2.

誌方法：日治臺灣殖民地人類學的寫真檔案)' (2017) 33 Journal of Taipei Fine Arts Museum (現代美術學報) 7.

47 Shu-Chiao Chen, 'The Study of Woven-Fabrics and Identity of Bunun: Katu of TakeTudu as an Example (布農族織品服飾與認同關係之研究--以卓社群卡杜部落為例)' (National Cheng Kung University 2005) 28.

48 ibid 22.

49 Skillman Library at Lafayette College, 'East Asia Image Collection' (*Digital Scholarship Services*) <http://digital.lafayette.edu/collections/eastasia> accessed 20 November 2017.

50 Chen, 'The Study of Woven-Fabrics and Identity of Bunun: Katu of TakeTudu as an Example (布農族織品服飾與認同關係之研究--以卓社群卡杜部落為例)' (n 47) 28.

(Figure 3: *Bunun* women's traditional costume, 2008.[51])

The differences between these 'traditional' styles support the anthropological research argument that *Bunun* women have changed their traditional clothing to Han-Chinese style (漢式), at least 80 years ago.[52] An ordinary Han style garment is shown in Figure 4 for comparison:

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51 'Bunun Women's Traditional Costume' (*Digital Archives of Indigenous Peoples' Traditional Culture, Hualian County (花蓮縣原住民族傳統文化數位典藏)*) <http://abda.hl.gov.tw/Artifact/Detail/49> accessed 23 August 2018. CC Licensing BY-NC-ND.

52 Chen, 'The Study of Woven-Fabrics and Identity of Bunun: Katu of TakeTudu as an Example (布農族織品服飾與認同關係之研究--以卓社群卡杜部落為例)' (n 47) 24; Liam C Kelly, 'Formosan Savages and Southeast Asia' (*Le Minh Khai's SEAsian History Blog*, 18 February 2013) <https://leminhkhai.wordpress.com/2013/02/18/formosan-savages-and-southeast-asia/> accessed 20 November 2017; The Indigenous Peoples Commission, Taipei City Government, 'Bunun Costume' (*Culture and Knowledge of Taiwanese Indigenous Peoples (臺灣原住民族文化知識網)*, 2009) <http://tcgwww.taipei.gov.tw/fp.asp?fpage=cp&xItem=1001099&CtNode=17413&mp=cb01> accessed 23 August 2018.

(Figure 4: *Hakka* women's blue cotton garment)[53]

In addition, *Bunun* costume varies in different areas of Taiwan. For example, according to the research, the style of *Bunun* costume in southern Taiwan has been deeply influenced by its neighbour, *Paiwan*. *Paiwan* is another indigenous people living in Taiwan, and its traditional costume is famous for its colourful design. Chen Shu-Chiao describes her field experience: she showed a picture of women's costume of *Bunun* tribes in southern Taiwan to another *Bunun* tribe in central Taiwan, whereupon central Taiwan's *Bunun* were surprised and said, 'This is *Paiwan*'s costume, not *Bunun*'s.'[54] From the following photos (Figure 5 and Figure 6) of *Bunun* and *Paiwan* female costumes, we can observe the imitation and the creation in the design of *Bunun*'s 'traditional' costume.

[53] The photo is collected by Taiwan's local government, see: Department of Hakka Affairs, Pingtung County Government, 'Hakka Traditional Clothing' <https://www.pthg.gov.tw/planhab/cp.aspx?n=FC5EC1411C00C0C7> accessed 23 August 2018.

[54] Chen, 'The Study of Woven-Fabrics and Identity of Bunun: Katu of TakeTudu as an Example (布農族織品服飾與認同關係之研究--以卓社群卡杜部落為例)' (n 47) 31, 111.

(Figure 5: *Bunun* in southern Taiwan[55].)

(Figure 6: *Paiwan*'s female garment.)[56]

[55] Photograph by Chen-Yuan Wu(吳振源), collected from the website of Taipei City Government, The Indigenous Peoples Commission, Taipei City Government (n 52).

[56] Figure 6 is collected by Ketagalan Culture Center, see: 'Paiwan Costume' (*Culture and Knowledge of Taiwanese Indigenous Peoples (臺灣原住民族文化知識網)*) <http://tcgwww.taipei.gov.tw/ct.asp?xItem=1001097&CtNode=17412&mp=cb01> accessed 23 August 2018.

The example of *Bunun* costume shows that TCEs always absorb diverse cultural elements. They were born in the past, but are continuously reinvented.

1.3.2.2 Hybrid Holders of TCEs: Merging of Original and Artificial

In the context of *sui generis* rights, TCEs are known to be owned collectively by a group, a tribe, a community or a people. However, the holders of TCEs originally presumed by the *sui generis* rights are not the 'natural' or 'original' ethnic groups. The modern state often uses artificial rules to construct, recognise and categorise groups and communities. For example, the distinction and classification of indigenous groups is often not a reflection of their traditional and original demarcations but are artificial constructs emanating from modern colonial history and anthropology.[57] Taking the categories of Taiwan's indigenous peoples, for example, Kai-Shyh Lin suggests that indigenous groups and tribes in Taiwan were constructed by historical events and are ever-evolving:

> The present ethnic classification of Taiwan aborigines was largely established under the Japanese colonial government in the 1930s… The naming and classification of aboriginal groups, together with the reorganization and fixation of settlements, control of population movement and creation of aboriginal reservations contributed

[57] For the concerns with the relationship between nineteenth century anthropology and colonial effort, see Marilyn Strathern, *Property, Substance, and Effect: Anthropological Essays on Persons and Things* (Athlone Press 1999); Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973); Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books 2000); Vered Amit and Nigel Rapport, *The Trouble with Community: Anthropological Reflections on Movement, Identity and Collectivity* (Pluto 2002).

> to a new concept of an ethnic group as an entity having a relatively clear social boundary and possessing a unique system of language, kinship, customs, arts, rituals and religion.[58]

The modern state retains control over the naming of indigenous peoples in order to confirm their legal status. For example, the United States government has a list of federally-recognised tribes. In 2018, there were 567 Native American tribes legally recognised by the Bureau of Indian Affairs (BIA) of the United States. The Federal Register publishes an annual list of 'Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs'.[59] The official lists of tribes sometimes conflicts with the self-identification of indigenous tribes; a more detailed analysis of the official naming of indigenous groups will be discussed in Chapter 3.

From the US and Taiwan cases, we can conclude that communities and groups are not purely original; artificial rules from the state continuously construct the boundary of the holders of TCEs. Therefore, TCE holders are hybrid; they are the merging of the original and the artificial.

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[58] Lin (n 20) 200.

[59] 'Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs' (*Federal Register*, 30 January 2018) <https://www.federalregister.gov/documents/2018/01/30/2018-01907/indian-entities-recognized-and-eligible-to-receive-services-from-the-united-states-bureau-of-indian> accessed 13 September 2018.

1.3.2.3 Hybrid Protections of TCEs: Merging of Transnational and Local

The holders of TCEs are local communities, but the final goal of legal protection of TCEs is often argued to be transnational.[60] No matter how effective the legal protection might be at the domestic level, it would have no extra-territorial effect.[61] Local communities have to go beyond their borders in pursuit of international justice when foreign enterprises misappropriate local communities' TCEs. For example, a famous copyright lawsuit was filed by the Taiwanese indigenous people (Difang and Igay) in the US court, claiming that the European New Age band *Enigma* had copied and remixed Difang and Igay's singing of an *Amis* traditional ceremonial song. This case ended in 1999 with an out-of-court settlement, but the amount of compensation was confidential.[62] It symbolises the hybridity of transnational and locality in the issue of TCEs.

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[60] For example, Gibson argues the protection of community resources: 'Considering the limitations of conventional intellectual property systems, together with the recognised or specified need to strive toward a *sui generis* system of rights, the model presented will clarify the subject-matter of protection beyond mere property in resources, and the vesting of legal authority in the Indigenous or traditional "community"…. Ultimately, the goal is that of an international model based upon the recognition of the authority and capacity of "community".' See: Gibson (n 13) 275–276.

[61] Graham Dutfield, *Protecting Traditional Knowledge: Pathways to the Future* (International Centre for Trade and Sustainable Development 2006) 33.

[62] For the story of this transnational lawsuit, see: Nancy Guy, 'Trafficking in Taiwan Aboriginal Voices' in Sjoerd R Jaarsma (ed), *Handle with Care: Ownership and Control of Ethnographic Materials* (University of Pittsburgh Press 2002); Timothy Taylor, 'A Riddle Wrapped in a Mystery: Transnational Music Sampling and Enigma's "Return to Innocence"' in René TA Lysloff and Leslie C Gay, Jr. (eds), *Music and Technoculture* (Wesleyan University Press 2003); Shzr Ee Tan, *Beyond 'Innocence': Amis Aboriginal Song in Taiwan as an Ecosystem* (Ashgate 2012) 1–4; Alan Story, 'Don't Ignore Copyright, the "Sleeping Giant" on the TRIPS and International Educational Agenda' in P Drahos and R Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Springer 2002) 138–139; Alpana Roy, 'Copyright: A Colonial Doctrine in a Postcolonial Age' (2008) 26 (4) Copyright Reporter 112, 115–116.

The protection of TCEs in Taiwan is also a good example of 'the merging of transnational and local.' At the domestic level, the Constitution of Taiwan recognises multiculturalism as the constitutional foundation of *sui generis* when it comes to the IP of indigenous people. Accordingly, the Protection Act was enacted in 2007. However, the Protection Act also prescribes that, in the event of the creation of any IP treaties or agreements between the Taiwan government and foreign governments, such treaties or agreements shall prevail over the Protection Act.[63] The Protection Act shows that the Taiwan government has tried to respond simultaneously to the 'local' pressure coming from the Constitution and indigenous people and to the 'transnational' pressure resulting from international IP rules. Although it has been criticised, the current law confirms that the global IP rules prevail over the demands of the local.

As for the IGC's attitude, the IGC has emphasised the importance of the 'local' and has tried to explore the possibility of the application of customary law in the international context.[64] But the IGC's attitudes should be further observed in the future, because it is also argued that there is a phenomenon of 'the fall of customary law' in the IGC.[65]

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[63] Article 21 of the Protection Act, 'If there exists any intellectual creation protection treaties or agreements between the Taiwan government and foreign governments, such treaties or agreements shall be followed'.

[64] WIPO, 'Customary Law, Traditional Knowledge and Intellectual Property: An Outline of The Issues' (2013) <http://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf>.

[65] Brendan Tobin, 'Now You See It Now You Don't: The Rise and Fall of Customary Law in the IGC' in Daniel F Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge 2017).

Finally, even though local experience and knowledge will be recognised in the international forum, it should also be noted that 'for indigenous peoples, traditional knowledge is not merely "local" knowledge but knowledge of the universal.'[66] Therefore, 'universal' and 'local' have never been two oppositional ideas. It is the idea of colonialism that some knowledge can only be categorised as 'local', limited to a specific district, and Western knowledge and perspectives is always 'universal'. As Dipesh Chakrabarty describes colonial ideology, the European 'colonialism in the nineteenth century often assumed that their histories contained the majority instances of norms that every other human society should aspire to; compared to them, others were still the "minors" for whom they, the"adults" of the world, had to take charge, and so on.'[67]

Therefore, TCEs as an issue about the merging of local, international and even universal is also a reminder not to consider TCEs merely from one-sided perspective. Hybrid legal strategies and demands from different groups and international rules make the protection of TCEs a very challenging legal issue.

An overview of the three layers of the hybridity of TCEs reminds us that the design of *sui generis* rights and registration systems should respond to the hybridity of TCEs. It has been argued that the binary distinction in the debate of IP—'in which we must choose

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[66] Caroline Joan 'Kay' S Picart, *Law In and As Culture: Intellectual Property, Minority Rights, and the Rights of Indigenous Peoples* (Rowman & Littlefield 2016) 13.

[67] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2000) 100.

either intellectual property or the public domain—obscures other important interests, options, critiques, and claims for justice that are embedded in many new claims for property rights.'[68] In Taiwan, the Protection Act tries to respond to the binary distinction between IP and the public domain and facilitate the interaction between the hybrid TCEs and registration. These dialogues and interactions will be explored in detail in the later chapters of this thesis.

1.4 Postcolonial Theory and TCEs

Since TCEs are regarded as hybridity in this thesis, postcolonial theory, which can more deeply analyse hybridity of culture and the shadow of colonialism in IP law, is a suitable theoretical foundation on which to base an analysis of the legal protection and the registration of TCEs. A brief introduction of postcolonial theory related to the issue of TCEs and the reason why it is chosen will be discussed here.

1.4.1 Why Postcolonial Theory?

In order to understand postcolonial theory and its relation to legal research, it is first necessary to understand what is meant by colonialism. Originally, 'colonialism' can be defined as the conquest and control of other people's land and goods, or as 'rule by outsiders for the benefit of the outsiders.'[69] It does not merely refer to the European intervention into Asia, Africa or the Americas from the sixteenth century; instead, it is a

[68] Anupam Chander and Madhavi Sunder, 'The Romance of the Public Domain' (2004) 92 California Law Review 1331, 1334.

[69] J Bruce Jacobs, 'Taiwan's Colonial Experiences and the Development of Ethic Identities: Some Hypotheses' (2014) 5 Taiwan in Comparative Perspective 47, 48.

recurrent and widespread feature of human history.[70] In addition, colonialism is not only a political or economic process. It also constructs a Eurocentric lens to understand the world, and the legacy is still influential even after post-war independence of European colonies.[71]

The meaning of 'postcolonial' is an ongoing debate among scholars. Originally used by historians after the Second World War, postcolonial had a clearly chronological meaning, referring to the post-independence period after war. However, from the late 1970s the term has been used by literary critics to discuss the various cultural effects of colonisation. It covers 'all the culture affected by the imperial process from the moment of colonization to the present day.'[72] In this thesis, 'post' implies an 'aftermath' in temporal and ideological terms,[73] and the 'post' in postcolonial should have two dimensions: a temporal dimension and a critical dimension.[74]

The sense of 'temporal' does not necessarily imply a lineal transformation from colonial to postcolonial. A country may be both postcolonial and neo-colonial at the same time. This occurs when they are a formally independent country but remain economically and

[70] Ania Loomba, *Colonialism/Postcolonialism* (Routledge 2005) 8.

[71] Desmond Hok-Man Sham, 'Heritage as Resistance: Preservation and Decolonization in Southeast Asian Cities' (Goldsmiths, University of London 2015) 20 <http://research.gold.ac.uk/12308/>.

[72] Bill Ashcroft, Gareth Griffiths and Helen Tiffin, *The Empire Writes Back: Theory and Practice in Post-Colonial Literatures* (Routledge 2002) 1–2.

[73] Loomba (n 70) 12.

[74] Peter Hulme, 'Including America' (1995) 26 Ariel 117, 121.

culturally dependent on other states.[75] Moreover, the independent state may carry out its plan of decolonisation unevenly and selectively; for example, the cancelling of colonial rule did not automatically bring about changes for the better in the status of women, the working class or indigenous people in most colonised countries.[76]

In the sense of 'critical', postcolonial 'refers to a process of disengagement from the whole colonial syndrome'.[77] It allows us to incorporate the history of anti-colonial resistance with contemporary resistances to dominant (Western) culture. Postcolonial theory tries to challenge the single value and the single-angle interpretation of world histories. Stuart Hall suggests that the concept 'postcolonial' may help us 'to describe or characterise the shift in global relations which marks the (necessarily uneven) transition from the age of Empire to the post-independence or post-decolonisation moment. It may also help us …to identify what are the new relations and dispositions of power which are emerging the new conjuncture.'[78]

Postcolonial theory also helps us to critically understand the practice and influence of law. Peter Fitzpatrick and Eve Darian-Smith argue that postcolonial theory 'is now the main mode in which the West's relation to its "other" is critically explored, and law has been to

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[75] Loomba (n 70) 12.

[76] ibid 16.

[77] Hulme (n 74) 120.

[78] Stuart Hall, 'When Was "The Post-Colonial"? Thinking at the Limit' in Iain Chambers and Lidia Curti (eds), *The Post-colonial Question: Common Skies, Divided Horizons* (Psychology Press 1996) 246.

the forefront of that very relation'.[79] Moreover, Alpana Roy suggests postcolonial perspective on law:

> A postcolonial reading of law…compels us to explore the role played by legal discourse in continuing the colonial narrative of dominance and subordination in this apparently postcolonial age… [P]ostcolonial theory may be used in legal discourse as a platform to challenge the nature of law's imperialism, and the base from which it unquestioningly operates.[80]

Therefore, using postcolonial theory does not mean that colonialism took place only in the past. On the contrary, postcolonial critics hope to emphasise that colonialism has never gone. There are at least three phenomena that represent the survival of colonialism. First, from an indigenous peoples' perspective, they are still under the shadow of colonialism. Indigenous peoples' stories regarding their struggle against the modern state and their colonial condition are surprisingly similar: their lands are being lost; their cultures are being ignored or misappropriated. Second, the Eurocentric ideology, philosophy and world view, which claim their universal validity, have never been thoroughly challenged and deconstructed. Third, economically, it has been argued that the global trade negotiation and harmonisation of global IP law symbolise a new wave of colonialism.

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[79] Eve Darian-Smith and Peter Fitzpatrick, 'Laws of the Postcolonial: An Insistent Introduction' in Eve Darian-Smith and Peter Fitzpatrick (eds), *Laws of the Postcolonial* (University of Michigan Press 1999) 4.

[80] Alpana Roy, 'Postcolonial Theory and Law: A Critical Introduction' (2008) 29 Adelaide Law Review 315, 357.

The issues of indigenous peoples' TCEs are relevant to these three dimensions, and postcolonial theory will provide a useful theoretical method to point out the shadows of colonialism performed in TCEs of indigenous peoples. The three colonial dimensions and the necessity of postcolonial critics will be further discussed below.

First phenomenon: Colonialism as conquering other people's land and goods, and its continuous control over indigenous peoples

Nowadays, although "the Global North's" economic domination of "the Global South" is often noticed and discussed, colonialism also includes the economic marginality of indigenous peoples under the modern state's sovereignty. As Loomba suggests, 'the term "postcolonial" does not apply to those at the bottom end of this hierarchy, who are still "at the far economic margins of the nation state" so that nothing is "post" about their colonisation.'[81] When Tracey Banivanua Mar researches the colonial history of the Pacific region, she reminds us that the United States, France, Indonesia, Chile, Peru, Australia and New Zealand still have either external colonial regions in the Pacific or internal indigenous groups who cannot fulfil their independence and self-governance. For her, decolonisation in the Pacific 'as a formal internationally sanctioned and promoted process, has thus brought limited gains for Indigenous peoples in the Pacific.'[82]

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[81] Loomba (n 70) 13.

[82] Tracey Banivanua Mar, *Decolonisation and the Pacific* (Cambridge University Press 2016) 14.

The fate of Taiwanese Indigenous peoples is similar to that of the indigenous peoples in the Pacific. In fact, although its connection to China is often (over-)emphasised, Taiwan is geographically and culturally an island in the Pacific. The languages used by Taiwanese indigenous peoples are classified as *the Austronesian language family*, to which most of languages of the Pacific islands belong. Archaeological evidence suggests that Taiwan was a critical geographical location as the origin of the ancient Austronesian peoples and played a part in the process of migration to the South Pacific Islands.[83] The deprivation of their land and various challenges on their cultural sustainability are part and parcel of the Pacific indigenous peoples' daily life. Chapters 3 and 4 will further discuss the shadow of colonialism over the relationship between Taiwanese indigenous peoples and the modern state.

Second phenomenon: Eurocentric world view constructs the definition of modernity, science and law

Except for the conquest of lands and goods, it has been observed that by the end of the nineteenth century, colonialism had produced its discourse and categorisation 'in which certain societies and cultures were perceived as intrinsically inferior.'[84] Colonial discourse establishes the concept of 'modernity' and 'development' to prove the coloniser's (European) superiority. History, in views of colonialism, becomes a lineal

[83] The Council of Indigenous Peoples, 'Taiwan Indigenous Peoples' (*Taiwan Indigenous Culture Park*) <http://www.tacp.gov.tw/tacpeng/home02_3.aspx?ID=$3001&IDK=2&EXEC=L> accessed 8 May 2018.

[84] Bill Ashcroft, Gareth Griffiths and Helen Tiffin, *Post-Colonial Studies: The Key Concepts* (Routledge 2000) 42.

development and 'universal' norm. Non-Western and non-'modern' histories and cultures are excluded or downgraded in the universal system; they are essentialised as homogenous, timeless or uncivilised cultures. Following the same route, Western ideology also influences the idea of IP and legitimises the misappropriation of TCEs, which will be further analysed in Chapter 2.

Third phenomenon: Economic domination in the local scale and in the global trade structure

As mentioned above, colonialism is not a mere force or violence. It can be duplicated from within. In Marxism's view, capitalism was deeply related to imperialism and colonialism. Nowadays, more and more scholars begin to argue the relevance of neo-colonialism and operations of international economics and free trade agreements after the Second World War. For example, the postcolonial theorist Gayatri Chakravorty Spivak argues that neo-colonialism is 'the largely economic rather than the largely territorial enterprise of imperialism', [85] and that 'the contemporary international division of labour is a displacement of the divided of nineteenth-century territorial imperialism.' [86] Indeed, economic neo-colonialism extracts the human and natural resources of a peripheral country and diverts it to the economies of wealthier countries at the centre of the global economic system; hence, the poverty of the peripheral countries is the result of how they are integrated into the global economic system. Afterwards, the former colonial powers

[85] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press 1999) 3.

[86] ibid 274.

or developed countries continue to apply existing and past international economic arrangements with their former colony countries or developing countries. The power of colonial control is still maintained, though the formality and the structure of the colonial control have changed.

As noted above, postcolonial is not a concept that can be used to determine the precise timing of the end of colonialism or to simply claim anti-colonialism. It is the ambiguity and complexity of colonialism that postcolonial theory tries to recognise, criticise, challenge and respond to. Stuart Hall suggests that 'what post-colonial certainly is not is one of those periodisations based on epochal "states", when everything is reversed at the same moment, all the old relations disappear forever and entirely new ones come to replace them.'[87] Therefore, in the following chapters, this research does not espouse the total cancelling of international IP law or the modern state's hands-off. After all, 'we are able not simply to oppose them but to critique, to deconstruct and try to "go beyond" them.'[88] To recognise the shadow of colonialism under IP law is the first step to consider a better law for the protection of TCEs.

Based on these postcolonial arguments, Part 2 (Chapters 2, 3 and 4) of this thesis will discuss the shadow of colonialism before and during the negotiations of TRIPS, in the operations of international IP, in the discourse of protecting TCEs, and in the interaction between indigenous peoples and the state. Moreover, in this thesis, indigenous peoples'

[87] Hall (n 78) 247.

[88] ibid 254.

actions and struggles for survival will also be examined to avoid a metropolis-centred analysis. The colonial discourse and its repression should be observed, but it is equally important to examine the response of the colonised. The one-sided emphasis of the colonial power 'effectively stripped the indigenous peoples of their agency'.[89] My case study focusing on Taiwan's Protection Act and the response of indigenous peoples (see Part 3 and 4) is also an attempt to balance the focus of colonialism in the global IP and a real practice of the Protection Act jointly constructed by Taiwanese indigenous peoples and the modern state.

1.4.2 Bhabha's 'Hybridity' and TCEs

The definition of TCEs is argued to be connected to 'the ambiguous and fluid concepts of "culture" and "tradition"'.[90] In this section, Homi Bhabha's postcolonial criticism related to 'tradition', 'culture' and 'the right to narrate' will be used to analyse the conventional (mis)understanding of TCEs. The idea of 'TCEs as hybridity' has been briefly introduced in Section 1.3, and this section further proposes a postcolonial perspective on TCEs by examining each individual word found in this official term (traditional, cultural, expressions) that is used by WIPO.[91]

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[89] Ken S Coates, *A Global History of Indigenous Peoples: Struggle and Survival* (Palgrave Macmillan UK 2004) 93.

[90] Christoph Antons, 'Chapter 1: Introduction' in Christoph Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International 2009) 4.

[91] Although the legal terms have changed several times and have included such terms as 'folklore', 'expression of folklore', 'indigenous cultural and intellectual property' and 'indigenous cultural heritage', TCE is the term used by WIPO today. See Zografos (n 36).

WIPO's 'Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions' (1982) preferred the term 'expressions of folklore' while 'folklore' was used in the 1997 UNESCO/WIPO World Forum on the Protection of Folklore. Moreover, 'folklore' is found in WIPO IGC's official title: the WIPO Intergovernmental

1.4.2.1 'Traditional'

Bhabha deconstructs tradition, claiming that 'the location of culture today is not in some pure core inherited from tradition, but at the edges of contact between civilisations where new, in-between, or hybrid, identities are being forged'.[92] For Bhabha, the emphasis on the fact that indigenous peoples' culture is not pure, original and traditional can resist colonial discourses, because colonial discourses often distinguish between 'pure cultures'.[93] To be specific, colonial power often works to divide the world into 'self' and 'other' in order to justify the material inequalities that are central to colonial rule.[94]

In the context of IP law, the term 'traditional' can also be used to both distinguish and discriminate. A criticism levelled at conventional IP law is that it sees 'traditional' cultural expressions as raw materials and as 'the opposite of property'.[95] Section 1.3.1.1 of this thesis has further suggested that no matter if TCEs are placed in the category of either 'raw materials' (which can be used freely in the public domain) or *sui generis* rights (which are established for special protections), the label of traditional is often a tool to classify

Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. In addition, by focusing on the IGC's documents, it can be observed that in the WIPO ICG's sessions from 2001–02 the committee referred explicitly to 'the expression of folklore'. However, after December 2002, the IGC's records began to use the term 'traditional cultural expressions' instead. See WIPO, 'Presentations on National and Regional Experiences with Specific Legislation for the Legal Protection of Traditional Cultural Expressions (Expressions of Folklore) WIPO/GRTKF/IC/28/4' (2002).

92 Homi Bhabha, 'In Between Cultures' (2013) 30 New Perspectives Quarterly 107.

93 David Huddart, *Homi K. Bhabha* (Routledge 2006) 5.

94 ibid.

95 James Boyle, 'Foreword: The Opposite of Property' (2003) 66 Law and Contemporary Problems 1; Madhavi Sunder, 'The Invention of Traditional Knowledge' (2007) 70 Law and Contemporary Problems 97, 100.

TCEs as the other. Since the distinction between 'self' (conventional IP rights) and 'other' (raw materials or *sui generis*) may be a ploy which colonial discourses use to legitimise discrimination, when we use the term 'traditional' to identify TCEs, we have to be aware of the fact that no single form of culture can be considered to be purely traditional. On the contrary, we should understand tradition as a place where in-between and hybrid identities are being created.

An example related to the hybridity of TCEs, the *Tsou* people's[96] *Mayasvi* (the ceremony of war), has been discussed by the *Tsou* scholar Chung-Yung Pu. He also borrows Bhabha's postcolonial idea to describe his tribe's *Mayasvi*. The 'traditional' style of *Tsou*'s *Mayasvi* is constantly being transformed as Taiwan's legal and social conditions change. Firstly, the most important part of *Mayasvi* before Japan's colonisation[97] was 'the ritual of man's head', which worshipped gods through the sacrifice of their enemies' lives, but this ritual is now forbidden under the criminal law of the modern state. Secondly, Chung-Yung Pu observed that, in the past, *Mayasvi* was the tribal members' act of worship for supernatural spirits, so it was not organised and designed for outsiders and tourists. However, the *Mayasvi* ceremony continuously responds to contemporary social life. The current *Mayasvi* welcomes non-*Tsou* visitors and becomes part of the event for tribal tourism. In order to cope with tremendous numbers of tourists, a *Tsou* tribe *Tapangu* uses

[96] *Tsou* is one of the 16 Taiwanese indigenous peoples officially acknowledged by Taiwan's government. Tsou people live primarily in the Ali Mountain, Taiwan. They have a strict family system and own sophisticated leather-making techniques. Generally, they have the skill to use muntjac skin to make hats and shoes and use goat skin to fabricate their clothes. See: 'Tsou Tribe_Meet the Saisiyat Tribe' (*Taiwan Indigenous Culture Park*) <http://www.tacp.gov.tw/tacpeng/home02_3.aspx?ID=$3101&IDK=2&EXEC=L> accessed 11 November 2016.

[97] Taiwan was colonised by Japan in the period 1895-1945. Taiwanese indigenous peoples' history of being colonised will be introduced in Section 1.5.

a camera and multiple television screens for the live broadcast of *Mayasvi*.[98] It also becomes an important event in that *Tsou* people working in the city return to the tribe during the ceremony and perform *Mayasvi* as an opportunity to confirm their *Tsou* identity again.[99] Finally, the worship songs of *Mayasvi* were originally sung in the ancient *Tsou* language, which could not have been understood by the tribal members speaking the contemporary *Tsou* language. In the last ten years, the elders have translated the lyrics of worship song (*'tohpxngx')* of *Mayasvi* from ancient *Tsou* to modern *Tsou* in order to help people understand the meaning of the worship songs. Currently the worship song '*tohpxngx'* is sung twice: it is sung in the ancient *Tsou* language for the first time, and then is repeated in contemporary *Tsou*.[100] *Tohpxngx* symbolises the hybridty of TCEs; it challenges the binary distinction between traditional and modern. Social life, new technologies and tourism have gradually interacted with *Mayasvi's* form, content and cultural meanings. Through practising *Mayasvi*, which changes its own form through years, tribal members find their *Tsou* identity and feel connected to the origin of *Tsou* history.

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98 Chung-Yung Pu, 'The Meaning and Interpretation of Mayasvi (鄒族戰祭的意義與詮釋)' (2011) 10 Taiwanese Indigenous People Review (台灣原住民研究論叢) 95, 105.

99 ibid.

100 The *Tfuya* tribe's written application published in the website of the Council of Indigenous Peoples, Taiwan: The Tfuya Tribe, 'The Application Form of Tfuya's Tohpxngx (鄒族特富野社歷史頌)' (*The Website for the Protection of Indigenous People's Traditional Cultural Expressions (原住民族傳統智慧創作保護資訊網)*) <http://www.titic.apc.gov.tw/ir2015db/%E9%84%92%E6%97%8F%E7%89%B9%E5%AF%8C%E9%87%8E%E7%A4%BEtohpxngx-%E6%AD%B7%E5%8F%B2%E9%A0%8C> accessed 26 March 2018. *Tohpxngx* has been registered as the *Tfuya* tribe's TCE and can be claimed as an exclusive right to use by the *Tfuya* tribe.

Moreover, *Mayasvi* negotiates with the modern state. The government has become the main financial sponsor of the tribal ceremony in recent decades. The tribal decision-making body was *soekayo* (the meeting of *Tsou* male elders) in the past, but recently the Committee of Tribal Ceremonies has been founded. Apart from the traditional leader and elders, the members of the Committee of Tribal Ceremonies also include governmental officials, Christian church members, women and young people. The committee is established as a negotiation platform to preserve *Tsou*'s 'tradition' and to deal with new affairs and challenges from contemporary *Mayasvi*.[101] Observing the tribal members' actions, Chung-Yung Pu argues that the current *Mayasvi* is not a natural or objective product; it involves the competition of knowledge, power and discourse.[102] Therefore, although indigenous ceremonies are classified as a 'traditional' cultural expression, *Mayasvi* is no longer purely a traditional ceremony. The interaction between the modern state, the visitors and the local community is producing new, in-between, or hybrid meanings of *Mayasvi*.[103]

The struggle and hybridity performed in *Tsou*'s *Mayasvi* is a reference showing what Bhabha has emphasised: negotiation of the colonised in everyday life at the cultural front under the colonial authority. These ambivalent and unnoticed activities are important actions for the colonised to preserve their local and living culture. They are not as 'traditional' as the coloniser assumes, but are 'the more subtle and everyday struggles for

[101] Pu (n 98) 116–117.

[102] ibid 103.

[103] Bhabha, 'In Between Cultures' (n 92).

equality, survival and cultural autonomy'[104]. It is necessary to recognise this dimension of TCEs when considering the protection of TCEs.

1.4.2.2 'Cultural'

Bhabha denies 'the essentialism of a prior given original culture'; he sees that 'all forms of culture are continually in a process of hybridity'.[105] Additionally, Bhabha introduces the notion of 'cultural translation' to suggest that 'all forms of culture are in some way related to each other, because culture is a signifying or symbolic activity'.[106] Therefore, culture is always a hybrid. Hybridity bears the markers of different meanings or discourses and 'it does not give them the authority of being prior in the sense of being original: they are prior only in the sense of being anterior'.[107] For this reason, 'the process of cultural hybridity gives rise to… a new area of negotiation of meaning and representation'.[108]

It should be emphasised that hybridity and cultural difference for Bhabha are not something which has always been there and can be easily celebrated. The argument that 'every culture is hybrid' is not the excuse to ignore the conflict and unbalanced power

[104] Jeff Makos, 'Rethinking Experience of Countries with Colonial Past' (1995) 14:12 The University of Chicago Chronicle <http://chronicle.uchicago.edu/950216/bhabha.shtml> accessed 29 December 2017.

[105] Jonathan Rutherfold, 'The Third Space: Interview with Homi Bhabha' in Jonathan Rutherfold (ed), *Identity: Community, Culture, Difference* (Lawrence and Wichart 1990) 211.

[106] ibid 209. Cultural translation will be introduced in Section 1.4.3.

[107] ibid 210.

[108] ibid.

relationship between different cultures. Cultural difference should be discussed carefully; as Bhabha suggests,

> you cannot just solder together different cultural traditions to produce some brave new cultural totality. The current phase of economic and social history makes you aware of cultural difference not at the celebratory level of diversity but always at the point of conflict or crisis.[109]

Challenging the binary distinction between self and other created by colonial discourse, Bhabha emphasise 'culture's in-between'[110]. The nature of differential cultural identities for Bhabha is 'neither One nor the Other, but, *something else besides, in-between*',[111] and 'negotiation of those spaces that are continually, *contingently,* "opening out", remaking the boundaries, exposing the limits of any claim to a singular or autonomous sign of difference.'[112] In Bhabha's opinion, an awareness of hybridity and culture's 'in-between' means that the minority does not need to be totalised as an imagined group or assimilated in order to claim a legitimate political status or cultural practice.[113]

If TCEs can be included under the *sui generis* regime, which often emphasises group rights and communal property, TCEs and their holders may be in the danger of being totalised

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[109] Homi K Bhabha, 'Art & National Identity : A Critics' Symposium' 79 (9) Art in America 80, 82.

[110] Rutherfold (n 105) 212–213. See Bhabha's discussion of culture's in-between in Homi K Bhabha, 'Culture's In-Between' in Stuart Hall and Paul du Gay (eds), *Questions of Cultural Identity* (SAGE Publications 1996) 53–60. Bhabha, 'Culture's In-Between'.

[111] Homi K Bhabha, *The Location of Culture* (Routledge 1994) 219.

[112] ibid.

[113] Rutherfold (n 105) 213.

and essentialised in order to be classified into a legal category and a legal subject. How TCEs and their holders can maintain their ability of negotiation within the structure of *sui generis* rights, especially in Taiwan's context, will be explored in Chapters 6 and 7, but in this section Spivak's postcolonial perspective regarding culture can preliminarily respond to the risk of essentialisation and totalisation through the practice of sui generis rights:

> "Culture" is also a regulator of how one knows: …the ability to know is "culture" at ground level… From this point of view, taxonomies of culture are possible and useful. But any "culture" at work is a play of differences…from these taxonomies… Simply put, it is how language use is a play of differences from dictionaries. Yet dictionaries are possible and useful… Culture alive is always on the run, always changeful. There is no reason to throw up one's hands over this. We do our work with this limit.[114]

The dictionary cannot record the changing meaning of language; it is still possible and useful if we recognise its limit. Similarly, the discussion of TCE protection is feasible on the condition that we understand that legal categories of TCEs cannot represent the changing and hybrid culture.

1.4.2.3 'Expressions'

Bhabha proposes 'the right to narrate', which is not only a legal or procedural right, but also an aesthetic and ethical matter.[115] He emphasises 'the right to narrate' in order to secure:

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[114] Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (n 85) 356–357.

[115] Homi K Bhabha, 'Democracy De-Realized' (2003) 50 Diogenes 27, 34. Inspired by Toni Morrison's fiction *'Paradise'*, 'Stepping in to find the pinpoint of light. Manipulating it, widening it,

> all those forms of creative behaviour that allows us to represent the lives we lead, question the conventions and customs that we inherit, dispute and propagate the ideas and ideals that come to us most naturally, and dare to entertain the most audacious hopes and fears for the future.[116]

In the context of protection of TCEs, the term 'expressions' among TCEs should be understood as diverse forms of creative and narrative behaviour, which maintain but also question people's cultural identities, customs and practice,[117] so the purposes of protecting TCEs should include protecting the right to narrate.

Moreover, Bhabha also suggests the right to narrate is 'the dialogic, communal or group right to address and be addressed, to signify and be interpreted, **to speak and be heard**, to make a sign and to know that it will receive respectful attention.'[118] It should be noted that for postcolonial theorists, to be heard is as important as to speak. Spivak also reminds us that 'no speech is speech if it is not heard.'[119] The speech can only be regarded as

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strengthening it,' Bhabha suggests that narratives 'invest language with the right to explore and endure, to survive and savour complex revision in the community of meaning and being.' See: Homi K Bhabha, 'On Writing Rights' in Matthew J Gibney (ed), *Globalizing Rights: The Oxford Amnesty Lectures 1999* (Oxford University Press 2003) 179–180. The quotation of *Paradise* is from Toni Morrison, *Paradise* (AA Knopf 1998) 247.

116 Bhabha, 'On Writing Rights' (n 115) 107.

117 As Johanna Gibson's comment on protections of TCEs noted, TCEs should not be protected 'as an end in itself but the ability of the community to continue to function and observe internal differentiation and communal integrity through its management and deployment of resources.' See: Gibson (n 13) 54.

118 Bhabha, 'Democracy De-Realized' (n 115) 34. (Emphasis added).

119 Gayatri Chakravorty Spivak, 'Translation as Culture' in Paul St-Pierre and Prafulla C Kar (eds), *In Translation: Reflections, Refractions, Transformations* (John Benjamins Publishing 2007) 274.

effective when it can be recognised and produces institutional effect, which is called 'institutionally validated action'[120] by Spivak. Therefore, for Bhabha and Spivak, the fulfilment of the right to narrate relies on the minority's agency supported by social institutions. The preservation of TCEs should open the real and effective dialogue between different cultures.

Comparing the right to narrate to existing legal rights, although freedom of expression does not equal to 'the right to narrate', Bhabha especially mentions that freedom of expression is fundamental to the right to narrate.[121] Moreover, he also recognises that the right to take part in cultural life in Article 5 of the International Convention of Economic, Social and Political Rights supports the right to narrate.[122]

WIPO's effort to protect TCEs in order to recognise and promote the dignity and cultural integrity of indigenous peoples is part of protecting 'the right to narrate', as the WIPO Draft Articles states that one of the purposes of protecting TCEs is to recognise

> the importance of promoting respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of

[120] Gayatri Chakravorty Spivak, *An Aesthetic Education in the Era of Globalization* (Harvard University Press 2012) 110, 438.

[121] Bhabha, 'On Writing Rights' (n 115) 180–181.

[122] ibid.

> the Indigenous [Peoples], [local communities] [and nations] / beneficiaries that preserve and maintain expressions of these cultures and folklore.[123]

However, aside from WIPO's focus on its aim to 'preserve and maintain' cultures as prescribed in the WIPO Draft Articles, it is necessary to emphasise the renewing perspectives of TCEs again: TCEs not only preserve and maintain our culture and customs, but also question and challenge them. Protecting TCEs is also a means of protecting a method which can assist in reconsidering discourses and ideas and challenging customs which have been taken for granted. As Gibson emphasises, the protection of the community's TK (including TCEs) should secure the community's ability to evolve and develop its resources, rather than fix TK to a particular identity, creator or owner.[124] Therefore, since the right to narrate assumes a commitment to create spaces of cultural and regional diversity[125] and to ensure our democracy 'based on dialogue and conversation between the uneven and unequal levels of development and privilege that exist in complex societies'[126], it can further supplement WIPO's reasons in the Draft Articles to provide protection of TCEs.

In summary, TCEs are cultural practices that keep self-renewing. Every (re)production and (re)presentation of a TCE is a performance of hybridity. TCEs represent and negotiate 'tradition', but they do not need to claim that they are 'original' and 'traditional'. The legal

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123 WIPO, 'The Protection of Traditional Cultural Expressions: Draft Articles, Rev.2 WIPO/GRTKF/IC/34/6' (n 2) 2.

124 Gibson (n 13) 54.

125 Homi K Bhabha, *Nation and Narration* (Routledge 1990) 181.

126 Bhabha, 'On Writing Rights' (n 115) 181.

protections of TCEs not only avoid the potential users from copying and misappropriating indigenous peoples' culture without prior consent, but also protect indigenous peoples' right to narrate their own culture, which will reverse the colonial power that silences indigenous peoples' voice. However, TCEs as hybridity will encounter challenge of registration: When TCEs are documented and registered, can they maintain their flexibility and hybridity? Bhabha's idea of 'negotiation' and 'cultural translation' will be introduced in the next section to provide theoretical foundation for analysing indigenous peoples' dialogue and negotiation with the idea of tradition and the modern state's registration.

1.4.3 Bhabha's 'Negotiation' and Registration of TCEs

Colonial Power that Produces Hybridisation

In contrast to Said's account of Orientalism,[127] which describes the coloniser and the colonised as obvious binaries,[128] Bhabha argues against the implication that power is possessed only by the coloniser. For him, the effect of colonial power is not just 'the noisy command of the colonialist authority or the silent repression of native traditions'; it is 'the production of hybridisation'.[129]

Bhabha argues that colonial power is hybridisation in order to blur binaries in the theories that try to explain colonial history and society, since his 'postcolonial' is a

[127] More discussions on Orientalism are in Chapter 2.

[128] Otto (n 29) viii.

[129] Bhabha, *The Location of Culture* (n 111) 112.

'fighting term' not only against colonialism but also against anti-colonial discourses such as Marxism and nationalism that may enforce essentialism of culture.[130] However, it should be noted that 'the noisy command of the colonialist authority' or 'the silent repression of native traditions'[131] still exist and cannot be ignored.

Bhabha believes that the temporality of negotiation

> …makes us aware that our political referents and priorities: the people, the community, class struggle, anti-racism … are not "there" in some primordial, naturalistic sense. Nor do they reflect a unitary or homogeneous political object. They make sense as they come to be constructed in the discourse of feminism or Marxism… or whatever, whose objects are always in historical and philosophical tension, or cross-reference with other objectives.[132]

Bhabha's idea of negotiation tries to explain the idea of community, people, nation and national culture,[133] and conceptualises the articulation and the negotiation of

> antagonistic or contradictory elements without either the idealism of a dialectic which enables the emergence of a teleological or transcendent History, or the scientism of symptomatic reading where the nervous tics on the surface of ideology reveal the real materialist contradiction that History embodies.[134]

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130 Neil Lazarus, 'Introducing Postcolonial Studies' in Neil Lazarus (ed), *The Cambridge Companion to Postcolonial Literary Studies* (Cambridge University Press 2004) 4.

131 Bhabha, *The Location of Culture* (n 111) 112.

132 ibid.

133 Bhabha, *The Location of Culture* (n 111) 140.

134 Homi Bhabha, 'The Commitment of Theory' (1998) 5 New Formations 5, 11.

It responds to what previously discussed; that is, the idea of community and tribe are merging with original and artificial. Their boundaries are constructed and are always in the process of negotiation and reconstruction.

Narration: the Pedagogical and the Performative

When further discussing the production of the nation and its culture, Bhabha describes a twofold structure and argues that the nation is hybrid 'narration': 'in the production of the nation as narration there is a split between the continuist, accumulative temporality of *the pedagogical*, and the repetitious, recursive strategy of *the performative*'. [135] Therefore, national culture can be articulated only by the interaction of the *pedagogical* and the *performative*; as Huddart explains: 'the process of the identity of a nation is twofold: there is a pedagogical dimension that foregrounds total sociological facts, and there is a performative dimension reminding us that those total facts are always open, and in fact are being subtly altered every day.'[136] Bhabha describes this as follows:

> We then have a contested conceptual territory where the nation's people must be thought in double-time; the people are the historical 'objects' of a nationalist pedagogy, giving the discourse an authority that is based on the pre-given or constituted historical origin in the past; the people are also the 'subjects' of a process of signification that must erase any prior or originary presence of the nation-people to demonstrate the prodigious, living principles of the people as contemporaneity: as that sign of the present through which national life is redeemed and iterated as a reproductive process.[137]

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[135] Bhabha, *The Location of Culture* (n 111) 145.

[136] Huddart (n 93) 81.

[137] Bhabha, *The Location of Culture* (n 111) 145.

Therefore, people living in the modern state exist in double-time. The modern state's pedagogic, which deeply command and influences people, can also be disturbed and negotiated by the strategy of *performativity*. People's negotiation with the *pedagogical* can be a resistance strategy, even though people use it unconsciously.

In this thesis, Bhabha's discussion of negotiation may also be applied to provide a postcolonial view with regard to the state's registration system, in particular, in order to see the state's registration as something other than a system generating binaries. The state's law and registration can be regarded as an accumulative temporality which includes *the pedagogical*, while indigenous people's cultural expressions can be considered the recursive strategy of *the performative*. As I will discuss in Chapters 6 and 7, some cases show that the nature of registration (the pedagogical) has been gradually transformed by indigenous peoples' *performativity*. The narratives of indigenous peoples are emerged from a 'double narrative movement'[138], and indigenous peoples are 'not simply historical events or parts of a patriotic body politic.'[139] Based on Taiwan's experience, this thesis plans to explore the following question: In the process of registering TCEs, can indigenous people's applications and the state's examination and approval be a process of negotiation?

Translation

[138] ibid.

[139] ibid.

Bhabha's idea of translation helps to reconsider the argument that IP law is unsuitable to represent indigenous peoples' idea of culture and guardianship. If indigenous peoples hope to claim their rights, they must act as 'translations of themselves',[140] 'in a form that they do not normally perceive themselves.'[141] Shand provides an example about indigenous people's translation of 'artist' and 'author':

> "artist" (or "author") is not necessarily an indigenous conception of the role played by creative individuals…for ease of discussion we will use the terms "artist" and "artistic" but offer a definition of our own making to define artists as "Trained practitioners and masters of the formal artistic and creative disciplines of our people." In *Kwakwala*, we would say "Xa nax'wa ni'nogad kotla'xees dlax-wa-tla-as" ("those who are knowledgeable know where they stand").[142]

In this case, Lai suggests that translation is 'a refusal to recognise the identity of indigenous applicant.'[143] However, for Bhabha, translation of cultures often happens, and it can be used as a way of resistance.

In order to challenge the essentialism of culture, Bhabha suggests the idea of 'translation of cultures' and adopts it as a strategy of resistance. The 'originality' of culture is often emphasised, but Bhabha believes that originality is always challenged by culture itself. As he argues,

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[140] Peter Shand, 'Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion' (2002) 3 Cultural Analysis 47, 65.

[141] Lai (n 25) 62.

[142] Shand (n 140) 64–65.

[143] Lai (n 25) 62.

> no culture is full unto itself…not only because there are other cultures which contradict its authority, but also because its own symbol-forming activity, its own interpellation in the process of representation, language, signification and meaning-making, always underscores the claim to an originary, holistic, organic identity.[144]

Cultural translation always happens, because, as previously discussed, 'all forms of culture are in some way related to each other.'[145] Translation opens up a place of hybridity, 'where the construction of a political object that is new, neither *the one* nor *the Other*, properly alienates our political expectations.'[146] Each political or cultural position 'is always a process of translation',[147] since it relates to other cultures and it is always hybrid. Bhabha's idea of translation denies essentialism of culture and emphasises the representation of the political and the necessity of heterogeneity.[148] He suggests that the translation of cultures is 'a complex act that generates borderline affects and identifications'.[149]

Moreover, Bhabha borrows Walter Benjamin's idea of translation and translatability and suggests that in some cases, there is the element that cannot be translated:

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144 Rutherfold (n 105) 210.

145 ibid 209–210.

146 Bhabha, 'The Commitment of Theory' (n 134) 10–11.

147 ibid 12.

148 ibid.

149 Bhabha, 'Culture's In-Between' (n 110) 54.

> Although translation, unlike art, cannot claim permanence for its products, its goal is undeniably a final, conclusive, decisive stage of all linguistic creation. In translation the original rises into a higher and purer linguistic air, as it were. It cannot live there permanently, to be sure, and it certainly does not reach it in its entirety. Yet, in a singularly impressive manner, at least it points the way to this region: the predestined, hitherto inaccessible realm of reconciliation and fulfillment of languages. The transfer can never be total, but what reaches this region is that element in a translation which goes beyond transmittal of subject matter. **This nucleus is best defined as the element that does not lend itself to translation**.[150]

This thesis suggests that registering TCEs is also a process of translation. In registers, TCEs are represented in different ways, translated into written words, graphs and recordings for the government's examination and documentation. Translation facilitates the understanding and negotiation between different cultures, and it is also capable of maintaining the subjectivity of minority culture by ***untranslatability***: The applicant's explanation, documentation and application to the registries is a translation, but the final representation of TCEs in the registration system contains an essential part that cannot lend itself to translation. It is the untranslatable part of culture in the registration that can be the beginning of indigenous peoples' resistance and negotiation.

When the *Kiwit* tribe[151] describes the motivation to register its TCEs, it also understands registration as 'translation'. Although the translation will be imperfect, it is still necessary in order to persuade outsiders to respect *Kiwit* culture. The *Kiwit*'s statement quoted

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[150] Walter Benjamin, *Illuminations* (Hannah Arendt ed, Harry Zohn tr, Schocken Books 1986) 75. (Emphasis added).

[151] Located in the east of Taiwan, *Kiwit* is a tribe belonging to *Amis* People. *Kiwit* originally is the tribal name of a local species of climbing fern and symbolises the vitality of *Kiwit* tribe. See: The Kiwit Tribe, 'About Kiwit' <http://kiwit01.blogspot.com/p/blog-page.html> accessed 13 August 2018.

below demonstrates that their registration of TCEs is an action of translation in order to negotiate with the state and outsiders:

> There is a great gap between Taiwanese mainstream culture and indigenous peoples' cultures, so we often try to 'translate' in order to let outsiders understand our culture. For example, we **translate** *ilisin* (the annual ceremony) into indigenous peoples' Chinese New Year. Outsiders will understand that songs and dance in *ilisin* are not for entertainment but represent serious meaning of ritual. We know that it is imperfect translation, but the imperfect translation has taught the outsiders how to respect indigenous peoples' worship ceremony… For us, the Protection Act is the law in which the state understands indigenous peoples' requirement of **translation** and respect for the first time…Moreover, the Protection Act itself is a law attempting to **translate** its legal principle in order to require the general public to understand and respect indigenous peoples' collective cultural value by using the form of law… We had doubted if the law would become a cage for our culture…But in consideration of many misappropriations damaging our cultural identity and sovereignty, we decided to apply the exclusive rights to use TCEs according to the Protection Act.[152]

Two Phases of Resistance: Negotiation and Refusal

Constructive registers provide two choices for indigenous peoples: they can either introduce their TCEs into the IP system or they can maintain a distance from the state's law. From a postcolonial perspective, and according to Bhabha's proposal with regard to the colonised subject's resistance,[153] either way can be performed as part of indigenous peoples' resistance. The first option is that the colonised can choose to challenge the coloniser's gaze. In the context of registers of TCEs, indigenous peoples may use the

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[152] The Kiwit Tribe, 'Defending the Tribe's Cultural Subjectivity and Sovereignty: The Kimit's Statement' <https://www.facebook.com/kiwit01/posts/1870205436352067:0> accessed 12 August 2018. (Emphasis added.)

[153] BJ Moore-Gilbert, *Postcolonial Theory: Contexts, Practices, Politics* (Verso 1997) 131–132.

process of registration as 'the strategic reversal of the process of domination…that turns the gaze of the discriminated back upon the eye of power.'[154] Indigenous peoples' active participation, especially in the process of their application, may change the form and content of registration, the transformed and registered TCEs as the production of hybridisation may also negotiate with the state's biases regarding TCEs. Chapters 6 and 7 will use Taiwan's indigenous peoples' participation in the registration of TCEs to examine Bhabha's idea.

The second option for Bhabha is that the colonised can simply refuse the coloniser's gaze. In this case, if registration is poorly designed or is suspected to be a system producing the stereotyped Other, indigenous peoples can refuse the coloniser's gaze (i.e., registration) and choose other legal methods to protect their own TCEs. Through their choice, 'resistance arises from the subaltern's apparently deliberate attempt to elude the subject positions to which the dominant order seeks to confine the Other in order to confirm itself as dominant,'[155] as Moore-Gilbert explains Bhabha's idea of resistance.

Whether protection of TCEs requires formalities, especially the necessity of involvement of the government's registers, is still in debate. Bhabha's idea of negotiation and translation can provide some insights to consider the issue of formality, but the possibility of indigenous peoples' resistance through negotiation with or refusal of the state's

[154] Bhabha, *The Location of Culture* (n 111) 112.

[155] Moore-Gilbert (n 153) 132.

registers requires further field research, especially within different local and regional historical and social contexts.

Example: Negotiation and Translation in the Tuban Village's Maljeveq

Finally, the traditional practice and the recent transformation of the 'five-year ceremony' (*Maljeveq)* in the Tuban village will be analysed as an example to illustrate Bhabha's negotiation and translation suggested in this section.

The Tuban village is a tribe of the *Paiwan* People[156] in Taiwan. *Maljeveq* is the most important ceremony for the *Paiwan* People*.* Sometimes, it is called the Bamboo Pole Ceremony because the ball-stabbing ceremony (*Djiemuijat*) is the climax of *Maljeveq*. The ball-stabbing ceremony symbolises a renewing of an agreement between *Paiwan* ancestral spirits and the tribe. *Parakaljai* (the priest) tosses vine balls representing various cultural meanings into the sky, and the qualified tribal members attempt to stab the balls with eight-meter-long bamboo poles (*tjulja*). The ball successfully stabbed by the pole-holder represents the fortune of such pole-holder and his family. Some vine balls bring blessings, but some balls imply bad luck. Once the ball-stabbing ceremony has

[156] Paiwan is the second-largest indigenous group in Taiwan. The population of Paiwan is around 100,591. The majority of Paiwan people live in both east and west sides of the southern chain of the Central Mountain Range. See: The Council of Indigenous Peoples, 'Paiwan: An Introduction' (31 2018) <https://www.apc.gov.tw/portal/docList.html?CID=E8F97E390107602E> accessed 5 August 2018.

ended, a sending-off ceremony follows to bid farewell to the ancestral spirits and the whole process of *Maljeveq* comes to the end. [157]

Paiwan society has a rigid hierarchy,[158] so the rights to holding bamboo poles and the characteristics of the bamboo poles are similarly structured according to social status.[159] According to the tribal rules, the longest bamboo pole and the totem of the sacred snake carved on that bamboo pole belong solely to the highest tribal chief. Moreover, the right to hold bamboo poles is owned solely by the tribal members. However, from 1973, the tribal chief granted the Catholic Church in the Tuban village the right to participate in *Maljeveq* and the right to hold a bamboo pole. The anthropologist Lian-Hui Chu, who is also an inhabitant of the Tuban village, explained this changing situation:

> Since the Second Vatican Council, the Catholic church reduced its control of indigenous peoples' traditional worship ceremonies and began to dialogue with local religions. The tribal chief agreed to the church's participation in *Maljeveq* and sold the church a special bamboo pole representing a higher social rank (different from ordinary people) in the tribe.[160]

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157 Tourism Bureau of Taitung County Government, 'Tjuwabal Paiwan Culture and Art Community' (*Taitung Travel*) <https://tour.taitung.gov.tw/en/attraction/details/528> accessed 29 April 2018.

158 For Paiwan's social hierarchy, see Bien Chiang, 'House and Social Hierarchy of the Paiwan' (University of Pennsylvania 1993); Kun-Hui Ku, 'Ethnographie Studies of Voting among the Austronesian Paiwan—The Role of Paiwan Chiefs in the Contemporary State System of Taiwan' (2008) 81 Pacific Affairs 383.

159 Lian-Huei Chu, 'Paiwan Five-Year Ceremony and Cultural Identity (排灣族五年祭與文化認同)' (Graduate School of Ethnic Relations and Cultures, National Dong Hwa University 2006) 71.

160 ibid 71, 81.

From 1983, Taiwanese government officials also began to participate in *Maljeveq*. The official chief of the township, the representative of the township and the official chief of the Tuban village were granted the right to hold bamboo poles. Moreover, from 2003, the right of holding poles was granted to the official chiefs of other villages. The increased range of participants broke with the tribe's custom that reserved the ceremony for the members of this tribe alone.[161]

In the Tuban village's *Maljeveq*, the governmental officials are required to follow the procedure of the ritual and present themselves as ordinary participants in the ceremony. Their bamboo poles belong to the rank of ordinary people rather than the rank of tribal chiefs. In the ceremony, the state's power yields to the traditional social hierarchy of the *Paiwan*. The Tuban village's *Maljeveq* has shown an ability to negotiate with the *pedagogical* sides of the church and the state. The state's strong involvement into indigenous peoples' ceremony has been criticised, but how the *performative* element of their ceremony negotiates with the state's rule should also be noted. The Tuban village deliberatively chose to negotiate with the church and the state, which has opened itself up to more possibilities and is a reminder that culture always evolves.

Recently, the Tuban village even held an academic conference, inviting tribal members and scholars to report on the research of *Maljeveq*. In the introduction of the *2013 Tuban tribe's Conference on Maljeveq*,[162] the authors in the Tuban tribe suggest, 'in the process

[161] ibid 81.

[162] The negotiation of Maljeveq (five-year ceremony) in Tuban village is analysed in Chapter 5.

of contacting mainstream culture, everything in our tribe should be **translated.** We try to use mainstream culture's language but get close to the real meaning of our culture.'[163] The Tuban village recognised the necessity of translation, but did not regard it as a denial of their identity. For them, translation becomes a tool to negotiate with the mainstream culture, and an opportunity to clarify the cultural meaning of *Maliveq* to the public.

1.5 Taiwanese Indigenous Peoples and Colonialism

Since the case study in this thesis will adopt a postcolonial perspective and focus on Taiwan's Protection Act and its registers of TCEs, the colonial background of Taiwan's indigenous peoples should be briefly introduced in order to understand the role they played in Taiwan's history. Taiwan's around 600,000 indigenous people are frequently overlooked,[164] especially because international society is under the impression that Taiwan is closely-related to China and the Han-Chinese people. However, as the activist Munsterhjelm argues, 'Yet at nearly two percent of Taiwan's 22 million people, they (annotation: Taiwan's indigenous people) compose a similar percentage of the national population as do First Nations in Canada (3 percent) and Australia (1.8 percent).'[165] Currently the officially recognised indigenous peoples in Taiwan include sixteen peoples:

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163 Han-Wen Cheng, *Maljeveq: 2013 Conference in Tuban Tribe (Maljeveq：2013 台東土坂學術研討會紀事)* (Eastern Taiwan Studies Association 2014). (Emphasis added.)

164 The Statistics of the Council of Indigenous Peoples, January 2018: <https://www.apc.gov.tw/portal/docDetail.html?CID=940F9579765AC6A0&DID=0C3331F0EBD318C2465BB6994589C30E#> Accessed 17 September 2018.

165 Mark Munsterhjelm, 'The First Nations of Taiwan: A Special Report on Taiwan's Indigenous Peoples' (2002) 26–2 Cultural Survival Quarterly Magazine <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/first-nations-taiwan-special-report-taiwans-indigenous> accessed 4 February 2018.

Amis, Atayal, Bunun, Hla'alua, Kanakanavu, Kavalan, Paiwan, Puyuma, Rukai, Saisiyat, Tao, Thao, Tsou, Truku, Sakizaya and *Sediq*.[166]

From the perspective of Taiwanese indigenous peoples, Taiwan has been ruled by a succession of six colonial regimes. According to a simple but useful definition of colonialism provided by J. Bruce Jacobs, 'a colonial regime is ruled by outsiders for the benefit of the outsiders,'[167] all of the six regimes fit the definition: the Dutch (from 1624 to 1662), the Spanish (from 1626 to 1642), Ming Dynasty loyalist Koxinga (from 1662 to 1683), the Qing Dynasty of China (from 1683 to 1895), the Japanese (from 1895 to 1945), and the Han-Chinese's the Republic of China (1945 to the present).[168] Taiwan's long colonial history is ignored, because anthropological, legal, and historical researches overly focus on Chinese-centred interpretation, which leads to misunderstanding of Taiwan's colonial condition.

Among the six different colonial regimes, the Dutch, the Japanese, and the Chinese are three important colonisers who deeply transformed indigenous peoples' culture and life. The colonial condition under the control of the Dutch (1624-1662), the Japanese (1895-1945) and the Chinese (1945-), as related to the issues of this thesis, will be briefly introduced below.

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166 The list of officially recognised indigenous peoples in Taiwan cannot completely match the self-identity of indigenous peoples. The process of official recognition and its problems are introduced in Section 3.2.

167 Jacobs (n 69) 48.

168 Munsterhjelm (n 165); Jacobs (n 69) 48.

(1) Dutch-colonised Taiwan (1624-1662)

First of all, the Dutch were the colonisers that introduced the concepts of Western private property and registration of land to Taiwan. Also, the settlement of Han-Chinese in Taiwan was hugely promoted by the Dutch colonial regime. The overwhelming numbers of Han-Chinese inhabitants gradually made indigenous peoples become a minority in Taiwan.

In order to encourage the development of Taiwan's agriculture, the Dutch provided many incentives to invite the migration and investments of Taiwan's neighbour, the inhabitants in South-east China. Tonio Andrade argues for the existence of a system of co-colonisation between the Dutch and the Han-Chinese in this period,

> A Dutch military and administrative structure co-evolved with a much larger Chinese agricultural and commercial colony in a process of co-colonization. Without the Dutch East India Company, Chinese colonization would not have occurred when and how it did; without Chinese labour, entrepreneurship, and social organization, the Dutch would not have been able to create a prosperous land colony.[169]

The Dutch East India Company promised the protection of personal property of land and personal liberty, which was an essential foundation for the Chinese's migration and settlement. Additionally, registration was a very essential tool for confirming private ownership. Andrade describes the Dutch Taiwan's management: 'private ownership

[169] Andrade (n 44) para 11 of ch 6.

rights were recorded in maps and a land register ("*landboeck*"), and the Dutch employed surveyors ("*landmeters*") to measure and record land use.'[170] From the Taiwanese indigenous people's view, the private property system and registration has been the product and the symbol of colonisation since the seventeenth century.

(2) Japanese-colonised Taiwan (1895-1945)

Japanese scientific statistics and anthropological classifications imposed on indigenous peoples deeply changed the cultural identity of Taiwanese indigenous peoples.

In 1895, Taiwan and the Penghu islands became the Japanese colony according to the Treaty of Shimonoseki following the First Sino-Japanese War. After Japan took over Taiwan from the Chinese Qing Dynasty, Taiwan became Japan's first attempt to create the model of Japanese colonies. The Japanese probably conducted the most detailed survey in the world, compared with other colonists' information management. A colonial system of knowledge was established in order to transform Taiwan into 'scientific' information and documents that the colonist could understand and control. As George Watson Barclay put it,

> Here is no lack of thoughtful research on the island during this period. While under Japanese rule Taiwan probably had the distinction of being the most thoroughly inventoried colonial area in the world. Huge compilations of statistics and numerous special surveys were made from year to year. The economy, the terrain, the aboriginal tribes, the mineral wealth, the agricultural output, the industrial

[170] ibid 24 of ch 6.

> production and the foreign trade have all been studied and restudied until there is little to be added to this knowledge unless new evidence is uncovered that is not now available.[171]

Indigenous peoples were the most obvious targets for Japanese study. Like other research projects assisting and even realising imperialism and colonialism around the world in that period, Japanese anthropological research was also supported and regulated by the rules of scholarly disciplines, scientific paradigms, academic institutions and the colonial state.[172] The Chinese Qing Dynasty sorted Taiwan's indigenous peoples into 'raw-barbarians'(生蕃) and 'cooked-barbarians'(熟蕃), which was based on their degree of assimilation to the Han-Chinese. A pioneer Japanese anthropologist Inō Kanori (伊能嘉矩), who came to Taiwan as a colonial official in 1895, argued that the categories of 'raw-barbarians' and 'cooked-barbarians' was a political distinction, not a 'scientific' classification scheme. He deployed Western ethnological doctrines for the scientific survey of Taiwanese indigenous peoples. In 1897, Inō Kanori conducted field surveys for 192 days, published an academic article in the *Journal of the Tokyo Anthropological Society*, and summarised the results of his survey to the Ministry of Civil Affairs in 1900. In this report, he divided indigenous peoples into eight races/groups (in Japanese: *shuzoku*, in Chinese:族).[173] Another Japanese anthropologist, Torri Ryūzō (鳥居龍藏), introduced

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171 George Watson Barclay, *Colonial Development and Population in Taiwan* (Princeton University Press 2015) x.

172 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books Ltd 2013) 7–8.

173 Inō Kanori's eight races (族) were *Atayal, Vonum, Tso'o, Tsarisen, Payowan, Puyuma, Amis* and *Peopo*. See: Matsuda Kyōko, 'Inō Kanori's "History" of Taiwan: Colonial Ethnology, the Civilizing Mission and Struggles for Survival in East Asia' (2003) 14 History and Anthropology 179, 184; Chen, 'Photography as Ethnographic Method: The Anthropological Photographic Archives in Japanese Colonial Taiwan (攝影作為民族誌方法：日治臺灣殖民地人類學的寫真檔案)' (n 46) 16; Hu (n 42) 100.

physical anthropology to Taiwan, proposed his own classification of Taiwan's indigenous peoples[174] and published his survey in the *Journal of the Tokyo Anthropological Society* in 1897. Moreover, his detailed reports 'produced a series of general descriptions of sub-groups of the larger group "banzoku" (savage tribes), consisting of village names, physical attributes of the inhabitants, descriptions of clothing, ornaments, and tattoos, some word lists, a couple of origin myths, and scattered references to housing styles.'[175] From the period of Japanese colonisation, the coloniser began to portray Taiwan's indigenous peoples 'in a welter of statistical tables, magazines and newspaper articles, photo albums, monographs, and exhibits for popular and official consumption.'[176]

(3)Chinese-colonised Taiwan (1945-)

After Japan surrendered in the Second World War, Taiwan was returned to the control of the Republic of China on 25 October 1945. In this period, Han-Chinese people's colonial policy regarding compulsory education and the official language made it very difficult to preserve indigenous peoples' culture and identity. However, indigenous peoples' movements became active along with Taiwan's democratisation after 1980.

There was a severe loss of indigenous peoples' languages as a result of the government's policy. Originally, Han-Chinese, who migrated from China during the Dutch colonial

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[174] Torii Ryūzō proposed seven major groups of Taiwan Aborigines: the Yugeiban (Tattooed Aborigines), Iwatan, Ami, Pilam, Chipun, Kalewan, and Pepo. See: Paul D Barclay, 'An Historian among the Anthropologists: The Inō Kanori Revival and the Legacy of Japanese Colonial Ethnography in Taiwan' (2001) 21 Japanese Studies 117, 131.

[175] ibid.

[176] Kyōko (n 173) 181.

period, spoke Halo-Taiwanese or Hakka, while indigenous peoples' native languages had diversity along with their tribes. Rare Taiwanese people spoke Mandarin. In the Japanese colonial period, Taiwanese people had to speak Japanese at school, but spoke their own mother tongue in their family and in their everyday life. However, the government of the Republic of China, which lost its territory in mainland China in 1949 but wished to claim their power over this area, successfully enforced a Mandarin policy to all Taiwanese people. In 1992, 90% of Taiwanese people spoke Mandarin in their daily life.[177]

From the indigenous people's perspective, it can be argued that the threat of their native languages was 'institutionalised' under the authoritarian control of the Kuomingtang (KMT, the Nationalist Party)[178] after 1949.[179] As Sun describes, before 1949 it was possible for Taiwan's indigenous peoples to maintain their culture and languages, though there had been two mains challenges: first, Han-Chinese's immense immigration to Taiwan and the threat of their powerful culture in 400 years, and second, capitalisation and modernisation promoted by the Japanese colonial government in the period 1895 to 1945. However, the powerful strategy of assimilation conducted by the KMT deprived

[177] Shu-hua Chen, 'The Postcolonial Featured Politics and Development of Taiwan Indigenous Language and Its Prospect' (2009) 21 Journal of Education (教育學誌) 51, 72–73.

[178] The KMT traces its ideological and organisational roots to Dr Sun Yat-sen (1866–1925), a proponent of Chinese nationalism and democracy, the first president and founding father of the Republic of China. Following the death of Sun Yat-sen, Chiang Kai-shek emerged as the KMT leader. After being defeated by the Communist Party of China in 1949, the KMT retreated to Taiwan and during 1949-1987 it conducted one of the longest martial law governances in the world. See: Hsiao-ting Lin, *Accidental State: : Chiang Kai-Shek, the United States, and the Making of Taiwan* (Harvard University Press 2016); Eunjung Choi, 'The Decline and Resurgence of the Kuomintang in Taiwan' (2015) 30 Pacific Focus 415.

[179] Da-Chuan Sun, 'A Reflection on Indigenous People's Mother Tongue (有關原住民母語問題之若干思考)' (1992) 5 The Edge of the Island (島嶼邊緣) 33, 33–34.

indigenous peoples' opportunity and ability to self-adjust when facing the conflict of cultures and capitalism.[180]

The challenge to the survival of Taiwanese indigenous peoples' languages is severe. According to the statistics of UNESCO regarding the world's languages in danger, *Saaroa, Thao, Nataoran, Kavalan* are listed as 'critically endangered', *Saisiyat* as 'severely endangered', *Bunun* as 'definitely endangered', *Tayal, Taroko, Tsou, Amis, Pyuma, Rukai, Paiwan and Yami* as 'Vulnerable', and, unfortunately, *Babuza, Basay, Hoanya, Ketangalan, Kulun, Papora, Pazeh, Siraiya, Taokas* as 'extinct'.[181][182] These above-mentioned extinct or endangered languages are all native languages of Taiwan's indigenous peoples. UNESCO's statistics show not only Taiwanese indigenous languages' diversity but also their miserable destiny.

After the end of martial law, various movements of indigenous rights began to be organised in Taiwan. Responding to indigenous peoples' claims, the Congress passed the laws to retrieve indigenous peoples' cultures and languages, including the Protection Act. Indigenous peoples' rights of lands, culture, and public health are confirmed by the Constitution. But can these beautifully-written laws change indigenous peoples' colonial

[180] ibid 34.

[181] Christopher Moseley (ed), *Atlas of the World's Languages in Danger, 3rd Edn.* (UNESCO Publishing 2010). Online version, see: 'UNESCO Atlas of the World's Languages in Danger' <http://www.unesco.org/languages-atlas/en/atlasmap.html> accessed 24 February 2018.

[182] These languages are ironically listed under 'China' by UNESCO, despite there being little relevance of Taiwanese indigenous peoples' to China in terms of descent, ethnics, culture, custom and language. It also shows the international organisation's ignorance of, and even doing harms to, the languages of indigenous peoples in their 'scientific' survey and categories.

condition? Chapters 5 will further explore Taiwan's Constitution and statutes in regard to indigenous peoples' rights.

1.6 Moving on

In this chapter, the main concepts of TCEs and the theoretical foundation of this thesis are introduced. Drawing upon postcolonial theory and using the Taiwan indigenous peoples as examples, this chapter finds that TCEs are hybrid rather than the opposite of property. However, when analysing the legal protection of TCEs from postcolonial perspectives, it is found to be possible that the shadows of colonialism in IP law, the modern state's control and registration, are unable to respond to the hybridity of TCEs and impact the practice of their protection.

Therefore, the next part of this thesis (Part 2) tries to examine three dimensions under the shadow of colonialism, namely (1) IP law and *sui generis* rights, (2) the relationship between the modern state and indigenous peoples and (3) the registration system. Chapter 2 will analyse the process of colonialism in international IP negotiation and law-making. Chapter 3 will try to understand the power relationship between the settler colonisers and indigenous peoples in the process of domestic law-making. Chapter 4 will look at documentation and registration—these are the important methods to protect the rights of TCEs, but the colonialism performed in these systems should also be recognised.

Part 2: Under the Shadow of Colonialism

The protection of TCEs is argued to be influenced by colonialism, which exists in the making of modern IP law, the negotiation of global IP law, legal literature and reports of TCEs, and the process of examination and registration of TCEs. Part 2 adopts a postcolonial perspective and reviews three major elements that constitute the legal protection of TCEs, including international IP negotiation and law-making (see Chapter 2), the modern state's control over indigenous peoples (see Chapter 3), and the state's documentation and registration of TCEs (see Chapter 4).

2 Under the Shadow of Colonialism (I): IP Law and TCEs

2.1. Negotiating Global Intellectual Property

When discussing the relationship between IP law and colonialism, some scholars suggest that the making of international IP law is a process of 'biopiracy'[1] and neo-colonialism by

[1] Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (Green Books 1998). The discourse of 'biopiracy' has been regarded as a resistance toward colonial ideology of Western IP law. It is argued that the campaign against biopiracy 'turns the discourse of piracy, as bandied about in the TRIPS…upside down. A number of activists seek to demonstrate that, rhetoric to the contrary notwithstanding, America's global corporations are the biggest "pirates" on the planet', see: Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press 2003) 140–141. Moreover, Oguamanam argues that 'biopiracy is now a touchstone for solidarity among indigenous peoples and former colonies in the South in their resistance to Western knowledge hegemony.' See: Chidi Oguamanam, 'Local Knowledge as Trapped Knowledge: Intellectual Property, Culture, Power and Politics' 11 The Journal of World

economic means.[2] For example, Aroha Te Pareake Mead points out that 'some regard cultural and intellectual property rights as the second wave of colonisation because the principles that underpin Western legal perceptions of particularly intellectual property are seen as a continuation of the ideologies of foreign conquest and domination.'[3] Global IP negotiations and harmonisation is also argued by Andreas Rahmatian to be neo-colonialism:

> An essential instrument in the process of neo-colonialism by economic means is the establishment of a legal framework of international trade, which confers legally enforceable rights that support and safeguard economic penetration and control…

Intellectual Property 29, 32. Spivak also considers the movement against biopiracy as a bottom-up global resistance to 'Development' defined by the United Nations or the World Bank. It is 'the real front against globalisation', one of 'the countless local theatres of the globe-girdling movements'. See: Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press 1999) 103, 413.

[2] Andreas Rahmatian, 'Neo-Colonial Aspects of Global Intellectual Property Protection' (2009) 12 Journal of World Intellectual Property 40, 42; Shiva (n 1); Keith Aoki, 'Neocolonialism, Anticommons Property, and Biopiracy in the (Not-so-Brave) New World Order of International Intellectual Property Protection' (1998) 6 Indiana Journal of Global Legal Studies 11; Shahrukh Khan, 'A New Kind of Colonialism: The Ramification of Intellectual Property Rights' (2014) 35 Harvard International Review 37; Laurelyn Whitt, *Science, Colonialism, and Indigenous Peoples: The Cultural Politics of Law and Knowledge* (Cambridge University Press 2009). Whitt believes that the term biocolonialism can represent the matters of indigenous sovereignty and its violation better than biopiracy, see: ibid 24. Conway-Jones sees the protection of TK and TCEs 'not just a theoretical question of confronting misappropriation and abuse; it is a question of political status and recognition.' The issue of TCEs is political, see: Danielle Conway-Jones, 'Safeguarding Traditional Knowledge and Cultural Heritage: Supporting the Right of Self-Determination and Preventing the Commodification of Culture' (2005) 48 Harvard Law Journal 754.

[3] Aroha Te Pareake Mead, 'Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific' in Leonie Pihama and Cherryl Waerea-i-te-rangi Smith (eds), *Cultural and Intellectual Property Rights: Economics, Politics & Colonisation, Volume 2* (International Research Institute for Maori and Indigenous Education, University of Auckland, Tamaki Makaurau 1997) 21. Also see: Toni Liddell, 'The Travesty of Waitaha: The New Age Piracy of Early Maori History' in Leonie Pihama and Cherryl Waerea-i-te-rangi Smith (eds), *Cultural and Intellectual Property Rights: Economics, Politics & Colonisation, Volume 2* (International Research Institute for Maori and Indigenous Education, University of Auckland, Tamaki Makaurau 1997) 32; Donna Ngaronoa Gardiner, 'Hands Off Our Genes: A Case Study on the Theft of Whakapapa' in Leonie Pihama and Cherryl Waerea-i-te-rangi Smith (eds), *Cultural and Intellectual Property Rights: Economics, Politics & Colonisation, Volume 2* (International Research Institute for Maori and Indigenous Education, University of Auckland, Tamaki Makaurau 1997) 45–47.

> The fairly recent implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is one major device that drives economic neo-colonialism forward, and the process of the making of TRIPS also demonstrates instructively this development.[4]

The following sections explore the academic discussion with regard to the shadow of colonialism in the making of IP law, including the pre-TRIPS period and TRIPS negotiation. Moreover, the *sui generis* right created for protecting TCEs is also discussed to analyse its relationship with colonialism and Orientalism.

2.1.1 Colonialism and Pre-TRIPS Period

(1) Local Transplantation: Empire's Interests

The birth of IP law is usually argued to be relevant to colonialism and empire. IP rights appeared to be a 'gift' from mother nations, along with other 'modernised' laws, administration, and development. Many 'modern' IP laws of developing countries were imposed during the era of empire-building.[5] For instance, four colonial powers, France, Germany, Spain and the UK included their colonies and protectorates into the Berne Convention in 1887.[6] Dutch accession to the Berne Convention in 1912[7] was announced

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[4] Rahmatian (n 2) 42.

[5] Akalemwa Ngenda, 'The Nature of the International Intellectual Property System: Universal Norms and Values or Western Chauvinism?' (2005) 14 Information & Communications Technology Law 59, 64–65.

[6] Peter Drahos, 'Negotiating Intellectual Property Rights: Between Coercion and Dialogue', *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave Macmillan 2002); Alpana Roy, 'Copyright: A Colonial Doctrine in a Postcolonial Age' (2008) 26 (4) Copyright Reporter 112, 120.

[7] The Netherlands' accession date is October 9, 1912 according to WIPO's records: <http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=1000C>.

in the colony in 1914.[8] After the colonies became independent states, they had to struggle over the dialogue with the IP system that had been left to them by their colonisers.[9] However, the capacity of their struggle was also limited by colonialism, because 'developing countries, in adjusting their intellectual property laws to suit their national interests, were only doing what they had observed developed countries doing.'[10] Postcolonial countries have sought for the reform of colonial IP regime after the end of colonial era, but most of them have been unsuccessful.[11] Some examples will be explored below.

Philippines

The forces of empire and colonialism working throughout the colonial era and the postcolonial era can be illustrated by the history of patent law in the Philippines. Spanish patent law had been introduced by the Spanish colonial power and applied in the Philippines in the early nineteenth century. This makes the Philippines the country with the longest tradition of the full IP protection in Southeast Asia.[12] Although the United

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[8] Christoph Antons, 'Indonesia' in Paul Goldstein and Joseph Straus (eds), *Intellectual Property in Asia: Law, Economics, History and Politics* (Springer Science & Business Media 2009) 88.

[9] Ruth L Gana, 'The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development' (1996) 18 Law & Policy 315, 328–334. For the influence of the coloniser's IP law in Asian countries, especially Indonesia, Malaysia, the Philippines, and Singapore, see: Assafa Endeshaw, *Intellectual Property in Asian Emerging Economies: Law and Policy in the Post-TRIPS Era* (Routledge 2010) 13–38.

[10] Drahos (n 6) 165.

[11] Alpana Roy, 'Intellectual Property Rights: A Western Tale' (2008) 16 Asia Pacific Law Review 219, 234; Roy (n 6) 121–123; Gary Lea, 'Digital Millennium or Digital Dominion? The Effect of IPRs in Software on Developing Countries' in P Drahos and R Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Springer 2002) 149–151.

[12] Christoph Antons, 'Intellectual Property Law in Southeast Asia: Recent Legislative and Institutional Developments' (2007) 1 Journal of Information, Law and Technology 3; Endeshaw (n 9) 26–27.

States gained control of the Philippines in December 1898, the Spanish patent law remained effective until 1913 and the Spanish copyright law remained effective until 1924.[13] After 1913, US patent law was applied and patent applications were sent to the U.S. Patent and Trademark Office. When the Philippines became an independent state in 1947, their patent law still largely followed US patent law.[14] Afterwards, the Philippines became the first country again in Southeast Asia to adopt a comprehensive IP code, following WIPO models, in 1995.[15] Drahos argues that 'the case of Philippines illustrates that many developing countries for most of their history have never exercised a meaningful sovereignty over the setting of intellectual property standards.'[16]

UK Colonies

Colonisers sometimes chose not to transplant their domestic IP law in their colonies due to their own national interests. In the case of the UK, the Foreign Reprint Act (known as the British Colonial Copyright Act 1847) was enacted in 1847. This Act allowed for the importation of unauthorised British reprints into the colonies. Michael Birnhack suggests the British Colonial Copyright Act is a law which served 'British interests rather than local copyright in the colonies'[17] and 'enabled easier colonial access to British knowledge'.[18]

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13 Endeshaw (n 9) 26–27.

14 Peter Drahos, 'Developing Countries and International Intellectual Property Standard-Setting' (2002) 5 The Journal of World Intellectual Property 765, 766.

15 Antons (n 12) 3.

16 Drahos (n 14) 766–767.

17 Michael D Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (Oxford University Press 2012) 10.

18 ibid.

During this period, the British Empire's interests, rather than the legal protections of the rights of British authors and publishers, were the first priority.

Another example which represents the colonial IP law serving national interests is UK patent law. It was amended to avoid the patentability of chemical compounds in order to prevent the development of the German chemical industry in 1919. For the coloniser's interests, India, Brazil, Argentina and Mexico all passed laws that weakened patent rights in the pharmaceutical area,[19] regardless of the local needs of the colonies. Emphasising IP as a means of serving British national interests, the term 'colonial copyrights' was used in the commentary and research papers at least from 1870 and well into the twentieth century.[20] Birnhack quotes the 1903 Harvard Law Review, which used this term to criticise colonial copyright, saying that it focuses on British interests rather than on the colonies' interests:[21] '…Colonial Copyright does not attempt to deal with the local legislation of the colonies, but merely with the rights of a work published in one part of the British Dominions to receive protection in any other part of the British Dominions'[22].

(2) The Unequal Battlefield of International IP

[19] Drahos (n 6).

[20] Birnhack (n 17) 10.

[21] ibid 11.

[22] Harvard Law Review Board, 'A Treatise Upon the Law of Copyright in the United Kingdom and the Dominions of the Crown and in the United States of America, Containing A Full Appendix of All Acts of Parliament, International Conventions, Orders in Council, Treasury Minutes, and Acts of Congress Now in Force' (1903) 16 Harvard Law Review 234.

The international IP regime has become a battleground among developing countries and developed countries, especially after many colonies became independent states.[23] Transforming from colonies into a participant of international IP conventions , and then into members of WTO, postcolonial countries tried to interact and/or resisted Western IP law, which is similar to Franz Fanon's criticism on colonialism in his book *Black Skin, White Mask*:

> *What? I have barely opened eyes that had been blindfolded, and someone already wants to drown me in the* ***universal****? What about the others? Those who 'have no voice', those who 'have no spokesman'?*[24]

That is to say, postcolonial countries did not have any time to consider how to protect their culture and had already been encumbered with the 'universal' setting of IP standards. Moreover, developing countries often face the problem of shortage of legal and technical expertise with regard to IP negotiation.[25] They have 'no voice' and 'no spokesman' in the process of globalising IP laws.

Developing countries have sought amendments to both the international copyright regime and the international patent regime, but eventually they failed. In the 1960s, developing countries were unsuccessful in their attempts to amend copyright rules to

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[23] Drahos (n 6).

[24] Frantz Fanon, *Black Skin, White Masks* (Charles Lam Markmann tr, new edn, Pluto Press 2008) 144. (Emphasis added).

[25] Developing countries lack legal experts during the negotiation of intellectual property rights, see: Section 2.1.2, (2) Involvement of Global businesses.

meet their needs in mass education. In addition, the revision of compulsory licensing of patented technology that had begun in 1980 was never completed.[26]

However, developed countries were also unsatisfied with the IP conventions that were managed by the United Nations. The US faced developing countries' blocs in the forum of WIPO, and then looked for an opportunity to commence multilateral trade negotiations within the General Agreement on Tariffs and Trade ('GATT').[27] A more global IP law, with more consideration for trade rather than culture, began to emerge.

2.1.2 Neo-Colonialism in TRIPS

After some developed countries (especially the US) tried to shift the international IP forum from the conventions under the United Nations to TRIPS, a more 'globalising' IP regime was introduced and negotiated.

The doctrines of TRIPS have also been criticised as neo-colonialism or imperialism by many scholars. For example, Michael Davis observes traditional IP doctrines and concludes that TRIPS is an immoral theft: 'Traditionally, IP is a matter of domestic, not international concern. The doctrine of national treatment…means, first and foremost, that

[26] Drahos (n 6) 166.

[27] Elaine B Gin, 'International Copyright Law: Beyond the WIPO & TRIPS Debate' (2004) 86 Journal of the Patent and Trademark Office Society 763, 781.

no country is required to recognize patentability (or copyrightability, or trademarkability) at all.' [28] Therefore,

> The theory of international intellectual property, supported by the two classical pillars of national treatment and territoriality, is that a country should refuse to adopt an IP regime until it has developed its IP-producing industries sufficiently to justify paying royalties to other nations… This is what the US did in the ninetieth century. TRIPS is a mean, cruel and ultimately immortal theft of the surplus national product of all undeveloped countries that become party to it.[29]

Moreover, Marci Hamilton criticises TRIPS as imperialism; she argues that 'TRIPS imposes a Western intellectual property system across-the-board' [30] without serious public debate and 'it is old-fashioned, Western-style imperialism'.[31] Similarly, Akalemwa Ngenda points out that international IP is a product of Western legal norms, so enforcing compliance of all countries around the world is the 'violence', which 'is manifested in how other ways of understanding the world were excluded from becoming a part of law.'[32] Finally, Rahmatian argues that 'the fairly recent implementation of TRIPS is one major device that drives economic neo-colonialism forward, and the process of the making of TRIPS also demonstrates instructively this development.' [33] It is argued by many

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[28] Michael H Davis, 'Some Realism about Indigenism' (2003) 11 Cardozo Journal of International and Comparative Law 815, 825.

[29] ibid 828–829.

[30] Marci A Hamilton, 'The TRIPS Agreement: Imperialistic, Outdated, and Overprotective' (1996) 29 Vanderbilt Journal of Transnational Law 613, 616.

[31] ibid 615.

[32] Ngenda (n 5) 64.

[33] Rahmatian (n 2) 42.

developing countries that the goal of promoting IP rights was 'simply to reinforce the economic power of developed nations and transfer wealth from poorer countries to richer ones.'[34]

In addition, it can be argued that the history of negotiating TRIPS is under the shadow of colonialism. I will explore two phenomena, coercion throughout the TRIPS negotiation and bilateral measures and involvement of global businesses, which have been regarded as neo-colonialism performing in the negotiation and enforcement of TRIPS.

(1) 'Coercion by Economics' throughout Negotiation and Bilateral Measures

Shiva argued that, 'free trade negotiations and treaties have become the primary locations for the use of coercion and force.'[35] The brief history of free-trade negotiation regarding IP will be explored in this section to consider the criticism regarding coercion and force in the process of negotiation.

Since the breakdown in negotiations of the revision of the Paris Convention in Geneva in 1984, developed countries realised that the polarised views and interests of developed and developing countries make it extremely difficult to reach any consensus in the WIPO forum. By the mid-1980s, the focus turned to bilateral measures designed to ensure the

[34] Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPS Agreement* (Routledge 2003) 8.

[35] Shiva (n 1) 112.

commercial interests of developed countries.[36] This trend also persuaded multinational companies in the US, Europe and Japan to exert pressure on their governments to ensure IP was the focus during the Uruguay Round of GATT.[37]

During the negotiation of GATT, developing countries might be thought of as being coerced into joining the international IP regime. It is argued that developing countries received coercive messages from developed countries, such as 'if you want to export your goods, agricultural and otherwise, you must protect the intellectual properties of other nations.'[38] The Uruguay Round offered developed countries a powerful weapon in terms of 'issue-linkage and package deals across sectors, particularly in relation to textiles and agriculture'.[39]

Drahos discovered that after the negotiations over the details of TRIPS began in 1990, some 'groups' were created within the TRIPS negotiations to push the process towards a final deal.[40] He points out the consensus of three groups really mattered in the TRIPS

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[36] Matthews (n 34) 12.

[37] ibid 7.

[38] Aoki (n 2) 20.

[39] Matthews (n 34) 45.

[40] According to Draho's observation, a list of these groups in roughly their order of importance would be: (1) The Unites States and the European Community. (2) The United States, the European Community and Japan. (3) The United States, the European Community, Japan and Canada (Quad). (4) Quad 'plus' (membership depended on issue, but Switzerland and Australia were regulars in this group). (5) Friends of Intellectual Property (a larger group that included the Quad). (6) '10+10' (and the Variants thereof such as '5+5' and '3+3'). The United States and the European Community were always part of any such group if the issue was important. Other active members were Japan, the Nordic States, Canada, Argentina, Australia, Brazil, Hong Kong, India, Malaysia, Switzerland and Thailand. (7) Developing country groups. For example, the Andean Group—Bolivia, Colombia, Cuba, Egypt, Nigeria, Peru, Tanzania and Uruguay combined to submit a draft text in 1990. (8)

negotiation. These three circles of consensus were (1)the United States and the European Community, (2) the United States, the European Community and Japan, and (3) the United States, the European Community, Japan and Canada. Through these circles, the TRIPS process became a hierarchical rather than a democratic management system.[41] Shiva also mentions two instances to argue that the process of negotiation is undemocratic and unilateral: In 1991, the GATT Secretary General Arthur Dunkel provided a take-it-or-leave-it draft. Additionally, in 1993, the GATT treaty was confirmed by a closed-door meeting between two men, Micky Kantor, the US trade representative, and Leon Brittan, the representative of the European Community.[42]

This is also the reason why developed countries prefer to transform the discussion forum of IP from WIPO to WTO: WIPO is close to the system of majority rule and every member has equal rights to vote for important issues. WTO's complicated circles of consensus and negotiating packages, which combine the issue of IP and the issue of exporting/importing agriculture, paved the way for the hierarchical position of developed countries.

Besides the hierarchy within the TRIPS negotiation, coercion was also conducted outside of the TRIPS negotiation. Most of the coercing powers were believed to originate from the US. As Drahos describes, 'the US in its Trade and Tariff Act of 1984 had begun adopting

Group 11: the entire TRIPS negotiating group. About forty countries were active in this group. See: Drahos (n 14) 771–772; Drahos (n 6) 168.

41 Drahos (n 14) 771–772; Drahos (n 6) 168.

42 Shiva (n 1) 113.

section 301[43] of its 1974 Trade Act to its objectives on IP, as well as liking its negotiating objectives on the protection of high technology to intellectual property trade barriers.'[44] The amendment of Section 301 in 1979 further provided private parties the significant position to enforce existing international trade agreements. [45] (Private parties' involvement will be described in the next section.) The US government officially connected the issue of IP protection with international trade in the Trade and Tariff Act of 1984.[46]

Furthermore, the Omnibus Trade and Tariff Act of 1988 introduced 'Special 301'[47] as the new bilateral trade legislation in order to respond to the enterprise's disappointment

[43] Section 301 of the U.S. Trade Act of 1974 authorises the President to take all appropriate action, including retaliation, to obtain the removal of any act, policy, or practice of a foreign government that violates an international trade agreement or is unjustified, unreasonable, or discriminatory, and that burdens or restricts US commerce. In the negotiation of international intellectual property, constructing intellectual property rights as a key issue for the negotiation of international trade and the linkage between trade and intellectual property may also be motivated by Section 301, which encouraged (or threatened) other countries to protect US companies' IP.

[44] Drahos (n 6) 169. Also see: Sell (n 1) 75–95.

[45] Bart S Fisher and Ralph G Steinhardt, 'Section 301 of the Trade Act of 1974' (1982) 14 569, 575; Sell (n 1) 78.

[46] Sell (n 1) 81–83, 85. Also see: Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (Oxford University Press 2003) 88–99.

[47] USTR introduces the function of the Special 301 Report as follows: 'The "Special 301" Report reflects the outcome of a Congressionally-mandated annual review of the global state of intellectual property rights (IPR) protection and enforcement. The review reflects the Administration's resolve to encourage and maintain enabling environments for innovation, including effective IPR protection and enforcement, in markets worldwide, which benefit not only U.S. exporters but the domestic IP-intensive industries in those markets as well. The Report identifies a wide range of concerns that limit innovation and investment, including: (a) the deterioration in the effectiveness of IPR protection and enforcement and overall market access for persons relying on IPR in a number of trading partner markets; (b) reported inadequacies in trade secret protection in countries around the world, as well as an increasing incidence of trade secret misappropriation; (c) troubling "indigenous innovation" policies that may unfairly disadvantage U.S. rights holders in foreign markets; (d) the continuing challenges of copyright piracy and the sale of counterfeit trademarked products on the Internet; (e) additional market access barriers, including nontransparent, discriminatory or otherwise trade-restrictive, measures that appear to impede access to healthcare and copyright-protected content; and (f) ongoing, systemic IPR

over negotiating the Tokyo Round of GATT and at revising the WIPO Conventions.[48] Special 301 required the Office of the United States Trade Representative (USTR) to review annually IP practices of foreign trading partners.[49] Also, US bilateralism was not confined to the countries in the category of the Priority Watch List or the Watch List in accordance with Special 301. For example, by 1989, USTR reported other successes, including copyright agreements with Indonesia and Taiwan, Saudi Arabia's adoption of patent law, and Colombia's inclusion of computer software in its copyright law. As a result, 'each bilateral the US concluded with a developing country brought that country that much closer to TRIPS.'[50]

Taiwan has been listed in the Watch List for twenty years. In 2009, the USTR conducted an out-of-cycle review and reported three reasons for removing Taiwan from their watch list. The three reasons are (1) Taiwan has established the IP court,[51] (2) Taiwan began to execute the policy regarding the protection of IP in education institutions; and (3) Taiwan has drafted the amendment of the copyright law, which follows the Digital Millennium

enforcement issues at borders and in many trading partner markets around the world.' See: the Office of the United States Trade Representative, 'Special 301' <https://ustr.gov/issue-areas/intellectual-property/Special-301> accessed 14 May 2018.

48 Matthews (n 34) 15.

49 ibid 25.

50 Drahos (n 14) 774.

51 Taiwan's Intellectual Property Court was established on July 1, 2008. The purposes of establishing the Intellectual Property Court are: (1) to avoid process delays and solve IPR disputes efficiently, (2) to accumulate judge's experience in adjudicating IP cases to achieve the goal of professionalism, and (3) to promote national economic development. See: 'Intellectual Property Court' <http://ipc.judicial.gov.tw/ipr_english/> accessed 30 October 2017.

Copyright Act of the United States[52] and regulates the limitation of internet service providers' infringement liability.[53][54] These three reasons are symbolic of the fact that the monitoring power of US domestic law deeply influenced Taiwan's judicial, administrative and legislative branches. For example, in 2001, the police and the prosecutor entered a university's dormitory to seize the students' notebooks and computers in order to search for illegal MP3 files. These actions faced lots of criticism but the main purpose of the police's actions was supposed to—disproportionally—demonstrate Taiwan's determination to the US government. In addition, between 1985 and 2009, Taiwan's copyright law had been amended eleven times and each amendment created stricter controls and rules in copyright law.[55]

(2) Involvement of Global Businesses

After the enactment of Special 301, the substantial power of monitoring and reviewing IP practices in other countries was transferred from the President to the USTR. In fact, the review of the USTR largely relies on surveillance of foreign countries by US businesses operating in foreign markets. These companies will periodically report their feedback and complaints to the USTR.[56]

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[52] Chih-An Li, 'An Analysis of Exemption of Internet Service Providers' Infringement Liability (網路服務提供者民事免責事由之要件分析)' in Kung-Chung Liu (ed), *Taiwan's Copyright Law: A International Comparative Perspective (國際比較下我國著作權法之總檢討)* (2014) 454.

[53] Taiwan's Legislative Yuan passed the bill later, in 2009.

[54] Chiung-Li Sun, 'The Reflection on the Removal from the Watch List (台灣從「特別 301」除名的反思)' *Coollord* (1 February 2009) <http://www.coolloud.org.tw/node/34623> accessed 30 October 2017.

[55] ibid.

[56] Matthews (n 34) 25–26.

Aside from the US's Special 301, the active role of transnational business in the TRIPS negotiation has been pointed out by many scholars. Shiva argues that 'the freedom that transnational corporations are claiming through IP rights protection in the GATT agreement on the TRIPS is the freedom that European colonisers and corporations have claimed since 1492.'[57] Indeed, global businesses began to play an essential role in the globalisation of IP rights during and after the negotiation of TRIPS.[58] If their business in developing countries experienced any obstacles, transnational corporations give their feedback to the state. Afterwards, the state would assert its economic power and sovereignty via international conventions. This process between the state and businesses is similar to what happened in the era of colonialism. For example, from the late 1870s, trading enterprises often exercised their commercial rights in a given territory. This prepared the ground for the colonial states to assert sovereignty in the foreign land: the states claimed that the sovereignty would provide protection for their businessmen.[59]

Duncan Matthews indicates that business involvement during the Uruguay Round influenced the positions held by the US, European Community and Japan in the process of negotiation.[60] The US officials in Geneva made frequent contact with their national industries. These national industries and their representatives also provided technical

[57] Shiva (n 1) 8.

[58] Sell (n 1) 7–8.

[59] Rahmatian (n 2) 58.

[60] Matthews (n 34) 43–44.

and legal advice and advocacy skills to US officials.[61] Additionally, the three business groups from the US, Europe and Japan published *Basic Framework of GATT Provisions on Intellectual Property: Statement of Views of the European, Japanese and United States Business Communities* in June 1988, offering national delegations a clear statement of business views. After this trilateral document, representatives of multinational companies travel more frequently to Geneva and express their concerns to national delegations and the staff of the GATT Secreteriat.[62] The process of transnational companies' production of IP knowledge is, as Susan Sell analyses, 'Industry reveal[ing] its power to identify and define a trade problem, devise a solution, and reduce it to a concrete proposal that could be sold to governments.'[63]

Compared to developed countries' abundant resources supported by global companies, developing countries faced the problem of vacancies for legal and technical experts when negotiating IP issues.[64] Records show that only about ten developing countries sent IP experts to the TRIPS negotiations.[65] Several developing countries were even simply

[61] A small group in the US, Intellectual Property Committee ('IPC'), is worth being mentioned. IPC is made up of twelve chief executive officers representing pharmaceutical, entertainment and software industries and it played a central role in the negotiation of GATT. See: Sell (n 1) 1–2; Drahos and Braithwaite (n 46) 118–119.

[62] Matthews (n 34) 43–44.

[63] Sell (n 1) 2, 54.

[64] Olufunmilayo B Arewa, 'TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks' (2006) 10 Marquette Intellectual Property Law Review 155, 163.

[65] Matthews (n 34) 44.

represented by generalist Trade Counsellors from national Permanent Missions to the United Nations in Geneva.[66]

The difference between developing countries and developed countries in relation to legal and technical expertise has made TRIPS an unequal negotiating forum. Private enterprises' involvement in national delegations' negotiation and their surveillance on the implementation of TRIPS in other countries creates an irresistible economic power controlling international trade agreements.

After 1989, developing countries failed to reject the invasion of IP agenda into global free trade negotiation and were given 'a grace period'[67] instead. After that, the focus of TRIPS has shifted from the so-called 'North-South confrontation' to North-North issues,[68] such as the patenting of life form, about which the Catholic Church and some European countries are deeply concerned, and the protection for geographical indications (GI) which the European Community and Switzerland bargained hard for.[69] The voices of the South were muted.

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[66] ibid.

[67] 'The grace period' provided to developing countries is also a suspicious term. A period of buffer time before the adoption of Western IP standard is called 'grace', but it is ignored that developing countries' acceptance of Western IP was resulted from unfair free trade negotiation. The discourse of grace is often observed in colonial discourse. For example, the colonisers claimed Western law and modernisation as their grace benefiting the colonised countries. In addition, colonial discourse often transforms the rights which the colonised is eligible to claim into the grace generously given by the coloniser.

[68] Sell (n 1) 111.

[69] ibid 111–112.

2.1.3 Colonialism beyond the North–South Distinction

A final point that should be raised in this section is that the neo-colonial relationship is not only between developed and developing countries. TRIPS was negotiated and signed by the states that do not necessarily represent the interests and worldviews of diverse indigenous groups living within the state's territory.[70] The legitimacy of developed countries' delegations in the IP forums is also questionable. As Jessica Lai argues about New Zealand's case, 'New Zealand both can and needs to address the Wai 262 Report[71] and its domestic laws, before purporting to negotiate treaties on behalf of Maori, and to thereby act as a world leader in this arena.'[72] Therefore, the complicated power relationship performed in the TRIPS negotiation goes beyond the North–South confrontation.

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[70] Debora J Halbert, *Resisting Intellectual Property* (Routledge 2005) 141; Darrell Addison Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (IDRC 1996) 53; Lakshmi Sarma, 'Biopiracy: Twentieth Century Imperialism in the Form of International Agreements Notes & Comments' (1999) 13 Temple International and Comparative Law Journal 107, 109.

[71] For the content of the Wai 262 Report, see: New Zealand, Waitangi Tribunal, 'Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity. Te Taumata Tuarua' (2011). The Wai 262 Report is the report New Zealand's Waitangi Tribunal issued on July 2, 2011. It addressed the ownership and use of Maori culture treasures (*taonga*), including traditional knowledge and TCEs. See: Jessica Christine Lai, *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* (Springer Science & Business Media 2014) 16–21, 227–233; B Sullivan and L Tuffery-Huria, 'New Zealand: Wai 262 Report and After' (2014) 9 Journal of Intellectual Property Law & Practice 403, 403; Sue Scheele, 'Safeguarding Seeds and Maori Intellectual Property through Partnership: A New Zealand Perspective' (2015) 2 International Journal of Rural Law and Policy 1, 1–4; Mamari Stephens, 'Taonga, Rights and Interests: Some Observations on WAI 262 and the Framework of Protections for the Maori Language Law and Language' (2011) 42 Victoria University of Wellington Law Review 241, 241–243.

[72] Jessica C Lai, 'New Zealand, Matauranga Maori and the IGC' in Daniel F Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge 2017) 289.

In Taiwan, the complicated postcolonial condition is also an example showing that the analysis based on the binary distinction between North and South countries cannot completely represent the unequal situations in the global IP system. On the one hand, because Taiwan is not internationally recognised as a country and cannot be a member of United Nations, it is always absent from the setting of the agenda and the debates of WIPO. Although many scholars recognise that WIPO is a better forum than the WTO for developing countries to negotiate fairer IP conventions, Taiwan cannot participate in WIPO. Taiwan has no choice but rely on the WTO as the only forum to negotiate its concerns with regard to IP issues, since Taiwan joined the WTO in 2002 as an economic entity under the name of 'Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu'.[73] There are rules and concepts embodied in TRIPS which already existed in some form or another in a diverse number of treaties administered by WIPO,[74] and Taiwan has to obey them. This means that Taiwan was bound by these IP principles and rules but it could not participate in the formation of them.

On the other hand, although the Taiwan government in the international society can be regarded as the oppressed, at the domestic level it is the power colonising Taiwanese indigenous peoples. As discussed in Section 1.5, diverse indigenous peoples with unique

[73] For more information regarding Taiwan's WTO member profile, see: World Trade Organization, 'Separate Customs Territory of Taiwan, Penghu, Kimmen and Matsu: Member Information' <https://www.wto.org/english/thewto_e/countries_e/chinese_taipei_e.htm> accessed 26 February 2018.

[74] Sisule F Musungu and Graham Dutfield, *Multilateral Agreements and a TRIPS-plus World: The World Intellectual Property Organisation* (Quaker United Nations Office (QUNO) & Quaker International Affairs Programme (QIAP) 2003).

ways of life have lived in Taiwan at least for 8000 years. However, *Han-Chinese* people migrated in Taiwan from the seventeenth century onwards and occupied Taiwanese indigenous peoples' lands. The overwhelming numbers of *Han-Chinese* migrants produce mainstream culture, and currently Taiwanese Indigenous peoples have been controlled by the modern state governed by *Han-Chinese* people.

Taiwan's liminal position between the centre and the periphery of the international community necessitates a reconsideration of the complicated postcolonial interactions that take place between the transnational, the national and the local. It is also the reason why Taiwan is a special case in which to observe the resistance of indigenous people and the government's dilemma in negotiation with international legal forums and local indigenous communities.

2.2 TCEs in the Public Domain

It has been argued that Western IP rights and the idea of public domain ignore the interests of poor people, indigenous people and developing countries. For example, Aoki suggests that developed countries' complaints about developing countries' piracy and their incomplete legal frameworks of IP seems 'to mask the amount of piracy occurring in the opposite direction—invaluable biological and cultural resources flowing out of the countries of the South as "raw materials" into the developed nations of the North.'[75]

[75] Aoki (n 2) 49.

The ignorance of poor people, indigenous peoples and developing countries is not a new invention by IP lawyers; on the country, it is connected to colonial history and colonial ideology. Seeing TCEs as 'uncivilised culture' or 'common heritage of humanity' has been a product of colonialism since the seventeenth century, and currently it still influences the discourse that justifies the exclusion of TCEs from the protection of international IP law. The production of dominating discourse of the conventional IP will be described in the next two sections (Sections 2.2.1 and 2.2.2).

2.2.1 Empty/Uncivilised Culture

The historian Ken S. Coates analyses the history of interactions between the Europeans and indigenous peoples from their first contact, and finds that from the first contact through to the present, indigenous peoples have generally been regarded as 'the other' rather than 'variants on a central theme of humanity.' To imperial government and citizens, indigenous people were 'lesser societies, less "advanced", less technologically sophisticated, and by definition less "civilised".'[76]

For the European newcomers, the image of indigenous peoples did not remain the same over the time. However, they did not have any motivation to revise indigenous peoples' image. Reality does not matter, because marking indigenous peoples as uncivilised, or as barriers in the way of development, can justify the coloniser's need to conquer, to control indigenous peoples' land.[77] As Coates points out, 'images proved to be powerful

[76] Ken S Coates, *A Global History of Indigenous Peoples: Struggle and Survival* (Palgrave Macmillan UK 2004) 82.

[77] ibid 89–92.

weapons,'[78] the image of indigenous peoples' less civilised and empty culture continuously influences Western legal systems.

Foucault described local knowledge as having been subjugated by colonialism, 'a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naive knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity.'[79] As previously discussed, the ideology of globalising IP law controlled by developed countries and global business is not so different from the ideology of European colonisers in the era of colonialism and imperialism. Shiva claims that what makes the two ideologies different is that the objects which they tried to occupy, manage and conquer are from 'empty lands' to 'empty life'. She emphasises the assumption of empty lands (*terra nullius*) is now being expanded to 'empty life':

> When Europeans first colonized the non-European world, they felt it was their duty to 'discover and conquer', to 'subdue, occupy, and possess'. It seems that the Western powers are still driven by the colonizing impulse: to discover, conquer, own, and possess everything, every society, every culture…The assumption of empty lands, terra nullius, is now being expanded to 'empty life,' seeds and medicinal plants…and this same logic is being used to appropriate biodiversity from the original owners and innovators by defining their seeds, medicinal plants and medical knowledge as nature, as nonscience, and treating tools of generic engineering as the yardstick of 'improvement.'[80]

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[78] ibid 90.

[79] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Colin Gordon ed, Pantheon Books 1980) 82.

[80] Shiva (n 1) 8–10.

Many commentators support Shiva's argument and suggest that colonialism applied in the IP system becomes biocolonialism,[81] which the West uses 'empty life' to define local knowledge as nature and nonscience.[82] The similar colonial stereotype is also applied to the area of culture, as the colonisers always consider local and indigenous culture as 'childlike'[83] and as 'empty culture' waiting to be civilised.[84]

There are different models of understanding the world conflict between the European colonisers and indigenous people; as Angela Riley describes, 'the European mission was satisfied when the colonisers arrive in "uninhabited" lands and mapped the world in their own image,' but 'the indigenous model rejects European tropes of discovery, invention, naming, and originality concepts which animate modern IP laws.'[85] The colonisers had legitimate reasons to carry 'civilisation' to the colonised, because they claimed that cultures of the colonised were empty, uncivilised, primitive, and less-developed. In order to have access to any ownership and entitlements, one first needed 'to be accorded a status among the "civilized"'.[86]

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81 Halbert (n 70) 139; Shiva (n 1) 8–10; Marie Ann Battiste and James Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Purich Pub 2000) 148; Beth Burrows, in Brian Tokar (ed), *Redesigning Life?: The Worldwide Challenge to Genetic Engineering* (Zed Books 2001) 239; Whitt (n 2) 3, 105–135.

82 Mead (n 3) 23.

83 Halbert (n 70) 136.

84 Kathy Bowrey and Jane Anderson, 'The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?' (2009) 18 Social & Legal Studies 479, 483–484.

85 Angela R Riley, 'Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities' (2000) 18 Cardozo Arts & Entertainment Law Journal 175, 190.

86 Bowrey and Anderson (n 84) 485.

Therefore, under the colonial constructed hierarchy[87] determining the civilised and the primitive,

> at its worst, indigenous groups in order to become "civilised" were banned from practicing religious and cultural ceremonies, and from speaking their native languages. At its best, native cultures and traditions were ignored as unimportant. For Europeans, Indigenous cultures represented an earlier stage of evolution. Europeans recognized Indigenous "crafts," but little credibility was given to these expressions of culture. Natives produced functional objects; art was something European and civilized.[88]

Western distinction of culture and art also supports the myth of indigenous culture as empty culture[89] and continues to inform IP law. In the eighteenth century, art was simply relevant to industry and skills, while culture meant natural growth. However, the emergence of an abstract, capitalised Art equated with individual creativity was developed in the nineteenth century, in the same period as the concept of capitalised culture, as a noun or the end product of an abstract process of civilisation, was developed.[90] When Culture becomes 'civilisation', anything not fitting into the Western definition of civilisation belongs to empty/uncivilised culture, which waits for development and management. As a result of indigenous people's presumed inferiority

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87 Arewa (n 64) 159–160; Oguamanam (n 1) 33.

88 Halbert (n 70) 137.

89 James Clifford, *The Predicament of Culture* (Harvard University Press 1988) 215; Rosemary J Coombe, 'The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy' (1993) 6 Canadian Journal of Law & Jurisprudence 249, 255.

90 Coombe (n 89) 255–256.

under the Western definition of civilisation, 'everything about "primitive" peoples was on offer'.[91]

Finally, the Western idea of culture and art influences modern IP law, but IP law also legitimatises the idea and enforcement of culture and 'civilisation'. Birnhack suggests that copyright law is a tool to legitimatise Western cultural and social values enforced in the communities of the colonised. He contends that 'from the coloniser's perspective copyright law can be part of a civilizing mission, which carried with it the set of Western values about literature, culture and much more.'[92] Copyrights enable the formation of cultural and legal categories of author, work, content industry and user and shape local people's behaviour. It is a legal field that regulates basic elements of our culture[93] and an instrument to introduce Western values with regard to literature, art and culture. Empty local cultures need to be improved and copyright can be a part of the modernised system to bring about development.

2.2.2 Common Heritage of Humanity

The recent discussions of TCEs begin to differ from the ideology that the colonisers considered non-Western culture as empty and less-developed culture. As people gradually came to appreciate the value of TK and TCEs and to use and copy these TK and TCEs, they preferred to use terms such as 'common heritage of humanity' when describing

91 Bowrey and Anderson (n 84) 485.

92 Birnhack (n 17) 6.

93 ibid 4–6.

and appropriating non-Western biological and cultural resources. For example, WIPO suggests:

> …preservation (of TK/TCEs) may have two goals. It may aim to assist the survival of TK/TCEs for future generations of the original community and ensure their continuity within a traditional or customary framework. Alternatively, it may aim to make the TK/TCEs available to a wider public (including scholars and researchers), in cognition of their importance as part of the collective cultural heritage of humanity.[94]

WIPO's description of TCEs symbolises a conventional perspective on indigenous peoples' culture. Even though the holders of TCEs can be identified, TCEs are eventually considered as the collective heritage of human beings. As Clifford observes the recognition of African objects as art in the 1930s in the Museum of Modern Art, New York City, these tribal 'artifacts are…defined as masterpieces, their makers as great artists…African objects escape the vague, ahistorical location of the "tribal" or "primitive".' However,

> [They] enter into a "universal" history, defined by the progression of works of great author/artists (the canon of civilisation). They become part of a **"human" cultural heritage**—Culture capitalised—rather than objects properly belonging to the

[94] WIPO, 'Intellectual Property and Sustainable Development: Documentation and Registration of Traditional Knowledge and Traditional Cultural Expressions, Background Paper WIPO/TK/MCT/11/INF/2' (2011) 6 (emphasis added). The same arguments are also in: WIPO, 'Overview of Activities and Outcomes of the Intergovernmental Committee (WIPO/GRTKF/IC/5/12)' (2003) 7, para 19; WIPO, 'Documentation of Traditional Knowledge and Traditional Cultural Expressions, Background Paper (WIPO/TK/MCT/11/INF/7)' (2011), para 22.

'cultures' defined by the discipline of anthropology in the nineteenth and early twentieth centuries.[95]

It is argued that seeing non-Western cultural products as collective cultural heritage is a view of colonialism. [96] The colonial phenomenon of culture continues into our contemporary world, as de Certeau suggests: 'Culture is the battlefield of a new colonialism; it is the colonised of the twentieth century.'[97]

IP systems provide a framework to legitimise the free appropriation of indigenous knowledge and to maintain the unequal relationship between Western authors and indigenous people. According to the principles of copyright, a Western author has the right to use any cultural resource from non-Western or indigenous communities, as these resources are 'common heritage of all humankind'. However, on the contrary, indigenous communities cannot freely use a Western author's work, as it is an 'individual creation' protected by copyright.

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[95] Coombe (n 89) 258. (Emphasis added).

[96] 'Indigenous peoples have been marred for centuries by the incredulous theft of knowledge they obtained…These problems are exacerbated by the use of IP rights, and the situation has delved to the point where nations bypass indigenous consent and wrongfully patent their knowledge and resources'. See: Khan (n 2) 37. For the similar argument, see: Laurie Anne Whitt, 'Indigenous Peoples, Intellectual Property &(and) the New Imperial Science New Directions in Native American Law: Part One: Interdisciplinary Perspectives: Literary and Philosophical Perspectives' (1998) 23 Oklahoma City University Law Review 211, 249; Halbert (n 70) 150; Khan (n 2) 37; Whitt (n 2) 15–18.

[97] Michel de Certeau, *Culture in the Plural* (University of Minnesota Press 1997) 134.

Claiming TCEs as a common heritage of humankind is often a doubtful principle. Describing the debates of using indigenous people's cultural heritage in 1992 in the society of Canadian artists, Coombe discusses some artists who demonstrated their concerns with the issue of cultural appropriation and claimed that the colonial histories had inspired their work. These artists emphasised how indigenous people's culture had influenced their individual imagination and creativity. However, these concerns and emphases may be dangerous. As a corollary to the issue of claiming that TCEs are a part of common heritage of humanity, Coombe argues 'these artists are not wrong, but they are incredibly selective.'[98] It is not acceptable that these artists claimed the right to represent cultural others (for example, indigenous people) in the name of 'universalised cultural heritage', but bypass the histories of racism, colonialism, poverty and alienation.

2.3 TCEs as *Sui Generis* Rights

As discussed in Chapter 1, even though TCEs are protected by a *sui generis* regime, they are also regarded as exceptional to conventional IP. The idea of *sui generis* applied in the protection of TCEs faces the risk of reinforcing the colonial idea and freezing the past.[99] The following section will consider how colonial discourse may influence the idea of *sui generis* rights.

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[98] Coombe (n 89) 283.

[99] The challenge of revitalising and/or freezing the past has been discussed by many scholars. For example, Michael Rowlands points out the complicated evaluation of promoting cultural rights and cultural property: 'State encouragement of Aboriginal art as an authentic cross-cultural product, or representing the authentic in architecture and town planning…helps to forge new traditions and to apologize somehow for the past. The tendency for this to freeze the past; to institutionalise an original sense of creativity which was otherwise viable and dynamic, has been a source of both complaint and recognition, e.g., in the right of convert an original creation into an object for sale, which has been both empowering and enriching for many indigenous peoples and an unwelcome sign of commodification.' See: Michael Rowlands, 'Cultural Rights and Wrongs: Uses of the Concept of Property' in Katherine Verdery and Caroline Humphrey (eds), *Property in Question: Value Transformation in the Global Economy* (Bloomsbury Academic 2004) 220.

2.3.1 Orientalism in *Sui Generis* Rights

Coombe suggests that two different attitudes, 'romantic individualism and Orientalism, operate as dangerous supplements that define an imperialist conceptual terrain that structures our laws of property and may well structure all contemporary political claims for cultural autonomy and public recognition.'[100] From her perspective, the shadow of colonialism seems everywhere and hard to escape: If ***romantic individualism*** [101] supports TCEs as common heritage, TCEs as *sui generis* rights is in danger of being influenced and interpreted by ***Orientalism***.

Orientalism,[102] proposed by Edward Said, is a system of Western knowledge to describe and understand the Orient as 'the other'. It is 'a Western style for dominating, restructuring, and having authority over the Orient.' [103] Orientalism reconstructs the Orient as the narcissistic reversal of the West's fictional Self, [104] as Said shows that

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[100] Coombe (n 89) 250.

[101] As Coombe describes the romantic author, 'He is free to find his themes, plots, ideas, and characters anywhere he pleases, and to make these his own...Any attempts to restrict his ability to do so are viewed as censorship and as an unjustifiable restriction on freedom of expression.' See: ibid 251–252. It is argued that romanticism is a discourse that marginises indigenous peoples' culture and world view. In the area of copyright, Bowrey and Anderson suggest that 'in copyright the stumbling block for Indigenous inclusion is attributed to romanticism and private property relations. These associations affect the copyright story, and lead to the essential marginalization of Indigenous subjects.' See: Bowrey and Anderson (n 84) 488–489.

[102] Edward W Said, *Orientalism* (Penguin 2003).

[103] ibid 3.

[104] Jeanne Willette, 'Post-Colonial Theory: Edward Said' (*Art History Unstuffed*, 6 September 2013) <http://www.arthistoryunstuffed.com/post-colonial-theory-edward-said/> accessed 22 April 2015.

'European culture gained in strength and identity by setting itself off against the Orient as a sort of surrogate and even underground self.'[105]

However, Said emphasises, 'none of this Orient is merely imaginative';[106] nor is the Orient 'a creation with no corresponding reality.'[107] On the contrary, it is a complex knowledge system; as Said argues,

> Under the general heading of knowledge of the Orient, and within the umbrella of Western hegemony over the Orient during the period from the end of the eighteenth century, there emerged a complex Orient suitable for study in the academy, for display in the museum, for reconstruction in the colonial office, for theoretical illustration in anthropological, biological, linguistic, racial, and historical theses about mankind and the universe, for instances of economic and sociological theories of development, revolution, cultural personality, national or religious character.[108]

The ideology of Orientalism also extends its influence when the conquerors or the colonisers create the image of indigenous people as their reversal. Under the guise of protecting 'tradition', the state establishes its modern and developed self-image when emphasising that indigenous people are internally homogeneous, traditional and timeless. The coloniser's discrimination towards indigenous peoples' rights will be legitimate when labelling them as 'the other'.

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[105] Said (n 102) 3.

[106] ibid 2.

[107] ibid 5.

[108] ibid 7–8.

Romantic individualism can classify non-Western culture as raw materials without detailed analysis on these cultures, while Orientalists are devoted to establishing a system of knowledge to define pre-colonial cultures and tradition. As Spivak suggests, the pre-colonial is always reworked by the history of colonialism. Pre-colonial societies are often described by colonial discourses as 'distant cultures, exploited but with rich intact heritages waiting to be recovered'.[109] Therefore, in the documents and reports proposing protection of 'tradition' and creation of *sui generis* rights, the clues of romanticisation and Orientalisation of TCEs should still be carefully examined.

(1) Binary Distinctions between Traditional/Modern; Individual/Communal; Temporary/Perpetual

How do we understand the relevance between *sui generis* rights and Orientalism? First of all, *sui generis* rights may trigger binary distinctions between traditional and modern, between individual and communal, and between temporary and perpetual. As discussed in Chapter 1, conventional copyright and 'TCEs as *sui generis* rights' often belong to opposing legal ideas. For instance, unlike conventional copyrights with limited durations of protection, the protection period for TCEs is often permanent. A further concern is authorship. While copyright is attributed to the individual creator(s), TCEs are traditionally owned collectively by a group, a tribe or a people. The logic of dividing

[109] Ania Loomba, *Colonialism/Postcolonialism* (Routledge 2005) 21. Also see: Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press 1988) 271–313.

conventional IP and TK/TCEs has always presented in regional legal frameworks[110] and WIPO's discussions.[111]

The interpretation of cultural rights in legal theory is often criticised over its emphasis on colonial notions of authentic difference and ignorance of dynamic dimensions of culture.[112] The logic of culture rights is often applied in the protection of TCEs and faces the same criticism. For example, Rahmatian argues that a potential neo-colonial device is practised in the discourse of TK/TCEs as *sui generis* rights. He believes that a protection mechanism for TCEs permits 'stereotyping and commodification of non-Western arts with an "ethnic" and ethical look'[113] and constructs an otherness which 'should be preserved or isolated and administered'.[114] This is 'a new kind of "Orientalism", a Western stereotypical representation and invention.'[115] It is an attempt to 'turn back the clock' and to seek the preservation of a cultural past against future economic, social or cultural development.[116] This approach has a tendency to present other non-Western

110 For example, Secretariat of the Pacific Community, Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture 2002.

111 For example, WIPO, 'Consolidated Analysis of The Legal Protection of Traditional Cultural Expressions WIPO/GRTKF/IC/5/3' (WIPO 2003); WIPO, 'The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles WIPO/GRTKF/IC/17/4' (2010).

112 Elizabeth A Povinelli, 'At Home in the Violence of Recognition' in Katherine Verdery and Caroline Humphrey (eds), *Property in Question: Value Transformation in the Global Economy* (Bloomsbury Academic 2004) 193.

113 Rahmatian (n 2).

114 Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge 1992) 62.

115 Andreas Rahmatian, 'Universalist Norms for a Globalised Diversity: On the Protection of Traditional Cultural Expressions' in Fiona Macmillan (ed), *New Directions in Copyright Law*, vol 6 (Edward Elgar Publishing Ltd 2007).

116 Rahmatian (n 2) 60.

societies as 'internally homogeneous and undifferentiated, timeless, defined by unchanging "traditions" and unable to creatively deal with outside influences, or interpret the impact of external forces.'[117]

The Orientalist attempt is found in the construction of the legal term 'TCEs'. Western lawyers and international negotiation and conventions selectively categorise some kinds of traditional art which can match Western imagination, especially visual art, music, dance and oral literature and placed them under the *sui generis* protection.[118] This attempt is quite similar to the colonial context in the nineteenth century which categorised art, culture, and authorial identity by colonial IP laws. Nowadays, Western lawyers are still making, managing and controlling 'tradition' with their own Orientalist assumptions and their enforcement of international agreements and conventions.[119]

(2) Over-emphasis on 'Difference' and Essentialisation of Indigenous Peoples

Following the binary distinction between traditional and modern and between personal and communal, scholars sometimes over-emphasise the idea that the concepts of modern IP law exist in direct opposition to indigenous people's creativity in order to acknowledge indigenous people's new rights over their TCEs. For example, Riley argues that 'the Romantic-inspired conception of "originality" is **in strict opposition to** indigenous

[117] Coombe (n 89) 252, note 20.

[118] Rahmatian (n 2) 60.

[119] Aside from TRIPS, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005 is also suggested as an international measure of imagining and controlling 'tradition'. See: ibid.

notions of creation',[120] and that 'the …definition of authorship exists **in direct opposition to** the communal methods of creativity symbolizing the structure of Native communities, which place the origins of tribal works in the group, not the individual'.[121] However, Marilyn Strathern uses people in Papua New Guinea to illustrate the concept of communal ownership, 'these people with their clan groups and face-to-face interactions are typical of the kinds of place where one might expect to find undifferentiated collectivities and the communal ownership of resources. In fact we find nothing of the kind.'[122]

Picart's analysis on the legal dispute of Amis ceremonial songs shows how extreme the binary distinction between different cultures was constructed in order to recognise indigenous people's rights of TCEs. Picart suggests that the traditional ceremonial song of the *Amis* tribe, misappropriated by the German rock band *Enigma*, represents the cultural conflicts between the Western 'extreme individualism' of the spokesperson for *Enigma* and the 'extreme communitarian ideal' of the Amis tribe.[123] The theoretical foundation of Picart's observation of cultural conflicts relies on Hofstede, Hofstede, and Minkov, *Exploring Culture: Exercises, Stories and Synthetic Cultures*,[124] which considers the American culture as individualistic and 'Asian' culture as collectivism.[125]

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120 Riley (n 85) 188. (Emphasis added).

121 ibid 191 (emphasis added).

122 Marilyn Strathern, 'Imagined Collectivities and Multiple Authorship' in Rishab Ghosh (ed), *CODE: Collaborative Ownership and the Digital Economy* (MIT Press 2006) 15.

123 Caroline Joan 'Kay' S Picart, *Law In and As Culture: Intellectual Property, Minority Rights, and the Rights of Indigenous Peoples* (Rowman & Littlefield 2016) 48–49.

124 Gert Jan Hofstede, Paul B Pedersen and Geert H Hofstede, *Exploring Culture: Exercises, Stories and Synthetic Cultures* (Nicholas Brealey Publishing 2002).

125 Picart (n 123) 48.

Picart's and Hofstede, Hofstede, and Minkov's arguments tend towards essentialism and Orientalism, because they use the generalised discourse to separate indigenous communities and Western culture but ignore diverse and hybrid characteristics that cultures have performed. Picart's analysis regarding cultural conflicts between extreme individualism and extreme collectivism is wrong; as will be explored in Chapter 6, the *Amis* People is not a people which merely recognises collective rights. The *Amis* People has a complicated property system which includes private and collective rights and responsibilities. Moreover, 'Asian culture as collectivism' can also be challenged by tracing back to the suspicious category of Asia. The idea of Asia is constructed,[126] when in fact it contains diverse countries and different cultures,[127] so 'Asian culture' cannot be totalised as 'extreme communitarians'. Even if we follow the existing definition of Asia and recognises that Taiwan is an 'Asian' country, it is extremely doubtful if indigenous peoples in Taiwan can be characterised as 'Asian', because the languages and cultures of Taiwanese indigenous peoples are more connected to South Pacific Islands cultures and the Austronesian language realm,[128] rather than to Taiwan's majority, Han (Chinese) culture.

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[126] Philip Bowring, 'What Is "Asia"?' (1987) 135 Far Eastern Economic Review; Amitav Acharya, 'Asia Is Not One' (2010) 69 The Journal of Asian Studies 1001. For more on how the colonial discourse constructed Southeast Asia, see: Farish A Noor, *The Discursive Construction of Southeast Asia in 19th Century Colonial-Capitalist Discourse* (Amsterdam University Press 2016).

[127] Acharya (n 126) 1001.

[128] The Austronesian realm is 'the linguistic zone where languages of the Austronesian family are spoken—is the vast area that stretches from Taiwan in the north to New Zealand in the south and from Madagascar off the east coast of Africa in the west to Easter Island (or Rapa Nui, geopolitically part of Chile) in the east'. See: Asya Pereltsvaig, *Languages of the World: An Introduction* (Cambridge University Press 2017) 251.

(3) Totalisation of Diverse Indigenous Peoples' Cultures

In addition, indigenous peoples' cultures are diverse, so it is doubtful when *sui generis* rights generalise a single 'tradition'. Upon his observation that colonial Australian administration has always refused to recognise that there are hundreds of Aboriginal cultures rather than one Aboriginal culture, Eric Michaels criticised: 'the overarching class "Aboriginal" is a wholly European fantasy, a class that comes into existence as a consequence of colonial domination and not before.'[129] Some commentators also point out that anthropological studies and *sui generis* rights strengthen a homogenous, 'pan-indigeneity'[130] and reify indigenous cultures as singular points of reference.[131] It has been argued by indigenous people that a single set of international *sui generis* rights cannot be suitable for all: 'any attempt to devise uniform guidelines for the recognition and protection of indigenous peoples' knowledge runs the risk of collapsing this rich jurisprudential diversity into a single "model" that will not fit the values, conceptions or laws any indigenous society.'[132]

Therefore, the violence of colonialism will be perpetuated when experts totalise and essentialise indigenous views in order to emphasise indigenous people's difference and 'ill-fit' with Western law.[133] In doing so, 'such work maintains discourses that generally

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[129] Eric Michaels, *Bad Aboriginal Art: Tradition, Media and Technological Horizons* (University of Minnesota Press 1994) 150.

[130] Bowrey and Anderson (n 84) 488; Jane E Anderson, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* (Edward Elgar Publishing 2009) 176.

[131] Bowrey and Anderson (n 84) 493; Anna Friederike Busch, *Protection of Traditional Cultural Expressions in Latin America: A Legal and Anthropological Study* (Springer 2015) 8.

[132] Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (Earthscan 2004) 123–124.

[133] Bowrey and Anderson (n 84) 482.

keep an emotional distance from the realities of Indigenous life and experience'.[134] The totalisation of indigenous peoples' cultures does not appear exclusively in law and legal theory, but many anthropologists also essentialise the subject of their research. The anthropologist Geismar made the criticism that

> Many anthropologists emphasise difference in order to privilege indigenous epistemologies and to present an alternative analytic to that of "Western" economics…I am, however, critical of the ways in which difference may be magnified within academic debate to the point that "alterity" becomes a romantic charter that removes the possibility of shared conceptual structures, both cognitive and political.[135]

If the term TCE is confined to the Orientalist construction of tradition, the protection of TCEs will obstruct the living power of indigenous culture. In fact, diverse and critical cultures developed from tradition are an everyday-life practice for every group. It is the colonial discourse that labels indigenous people's culture as traditional and isolates their culture. In order to avoid Orientalism and the shadow of colonialism, the design of a *sui generis* system should attempt to respond to TCEs as hybridity and to empower indigenous peoples' power of negotiation.

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134 ibid.

135 Haidy Geismar, *Treasured Possessions: Indigenous Interventions into Cultural and Intellectual Property* (Duke University Press 2013) 14. Also see: Amiria Henare, Martin Holbraad and Sari Wastell (eds), *Thinking Through Things: Theorising Artefacts Ethnographically* (Routledge 2007).

2.3.2 WIPO under the Shadow of Orientalism

The main international work programme of promoting TCEs as *sui generis* rights is the WIPO IGC.[136] Therefore, it is necessary to review IGC's idea of culture and tradition. The following three parts will set out a criticism of IGC's failure to avoid Orientalism. First, IGC recognised the necessity of binary distinction, at least in the legal argument, in order to legitimise the promotion of *sui generis* rights. Second, the idea of 'safeguarding' TCEs is paternalistic and may not respond to the reality of diverse characteristics of TCEs. Third, Indigenous peoples' voices in the forum and work team of the IGC are argued to be insufficient.

(1) Recognition of Necessity of Binary Distinction regarding the Issue of TCEs

IGC acknowledges that 'culture is in a permanent process of production; it is cumulative and innovative. Culture is organic in nature and in order for it to survive, growth and development are necessary—tradition thus builds the future.'[137] However, it also argues that there is still a distinction between 'pre-existing' culture and modern cultural expressions. As IGC explains,

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[136] Since the Fourth Session held in Geneva in December 2002, there have been IGC's long-term discussions of whether exiting intellectual property regimes are sufficient or whether *sui generis* systems are necessary to achieve protection of TK. For more on IGC's concerns, see: Johanna Gibson, *Community Resources : Intellectual Property, International Trade and Protection of Traditional Knowledge* (Ashgate 2005) 133–136.

[137] 'Consolidated Analysis of The Legal Protection of Traditional Cultural Expressions WIPO/GRTKF/IC/5/3' (n 111), para53.

> There is a distinction between "pre-existing" cultural heritage and modern, evolving cultural expressions. Put another way, one can draw a distinction between (i) pre-existing, underlying traditional culture (which may be referred to as traditional culture or folklore stricto sensu) and (ii) literary and artistic productions created by current generations of society and based upon or derived from pre-existing traditional culture or folklore…[138] While this distinction is not necessarily always a clear one because of the "living" and cumulative nature of cultural heritage, it is relevant to an IP analysis. This is because new arrangements, adaptations and interpretations of pre-existing folklore are more susceptible of protection by current IP laws. On the contrary, pre-existing folklore is not as well protected by current laws—and, it is a threshold policy question whether or not the pre-existing folklore ought to receive legal protection. If that question were to be answered in the affirmative, it is in this area that some modifications to existing rights, specific measures to complement existing rights and/or sui generis mechanisms or systems may be necessary.[139]

According to IGC's argument, while the distinction between traditional and modern culture is not necessarily always salient in our ordinary life, the difference has to be maintained. IGC's reason is that this distinction 'is relevant to an IP analysis',[140] including the standard deciding which subject matter can be protected by laws. Therefore, IP law becomes a powerful system maintaining the binary opposition between 'pre-existing' and 'evolving' expressions. It has to do so, in IGC's opinion, 'because new arrangements, adaptations and interpretations of pre-existing folklore are more susceptible of protection by current IP laws. On the contrary, pre-existing folklore is not as well protected by current laws.'[141]

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[138] ibid, para 54.

[139] ibid, para 56.

[140] ibid, para 56.

[141] ibid, para 56.

An example of WIPO's analysis based on obvious binary distinctions regarding TK and TCEs is WIPO's document '*List and Brief Technical Explanation of Various Forms in Which Tradition Knowledge May Be Found*'.[142] Although the paper aims to explore 'various forms' of TK, TK is understood and analysed merely by the binary distinction, including:

- unfixed TK and fixed TK, to which are related: (a) documented TK and non-documented TK and (b) codified TK and non-codified TK;
- disclosed TK and non-disclosed TK, to which are related: (a) TK directly controlled by indigenous and local communities and TK on longer in the control of indigenous and local communities and (b) TK held by indigenous and local communities;
- sacred TK and secular TK;
- TK "as such" and TK-based innovations and creations;
- indigenous knowledge and traditional knowledge;
- individual TK and collective TK; and,
- commercialized TK and non-commercialized TK.[143]

Legal analysis often depends upon a binary distinction to understand an issue. However, in the area of TCEs, great care should be taken when trying to understand them based on binary distinction. This is why the hybridity of TCEs is emphasised in this thesis. It should be used as a counter discourse against the colonial discourse, which always distinguishes people and culture using binaries such as tradition and modern, sacred and secular, or

[142] WIPO, 'List and Brief Technical Explanation of Various Forms in Which Tradition Knowledge May Be Found (WIPO/GRTKF/IC/17/INF/9)' (2010).

[143] ibid 4.

timeless and progress, and uses the legal dichotomy to justify inequalities and discrimination.

(2) Paternalistic Safeguarding

Gibson says of IGC's objective of protection of TK that it 'is presumed to be the "safeguarding" or preservation of traditional knowledge, in the sense that it is vulnerable to loss.'[144] Furthermore, in IGC's discussions on documentation of TK and TCEs, the vulnerable image of 'tradition' and local communities is particularly obvious:

> The objective of "safeguarding" knowledge is somewhat paternalistic, particularly when addressed through the reproduction of traditional knowledge within systems of documentation for the purposes of non-traditional scientific method and commercial exploitation…The need for documentation in order to maintain cultures presumes an inability on the part of particular communities to maintain their traditional knowledge through traditional means, a presumption which is often rejected by those communities whose knowledge is at stake.[145]

According to Gibson's observation, within the system of documentation and registration, the imagined vulnerability and the powerlessness of indigenous people's communities has been even more emphasised. We have to deal with the Orientalist concept in relation to TCEs and holders of TCEs more carefully when discussing the suitability of the state's registration system.

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[144] Gibson (n 136) 145.

[145] ibid 146.

Moreover, WIPO has a tendency to directly translate local communities' voice into legal terms in its report. For example, in the WIPO's fact-finding programme, when informants complained about the misappropriation of traditional songs and dances, the WIPO team translated the informants' concerns into a legal claim in the context of international IP law:

> Several persons stressed the importance of protecting performers' rights in relation to traditional dances and music and some of them anticipated, in this regard, the implementation of Article 14.1 of the TRIPS Agreement as a possible means for providing such protection.[146]

Translating the local requirement into the common legal terms by WIPO is a top-down method to collect facts in the early stage of considering the protection of TCEs, but it should be a desirable goal to transfer the power of translation to indigenous peoples and local communities.

(3) Indigenous People's Position in the IGC

If indigenous people cannot fully participate in the IGC's meetings and reports, IGC will become an institution discussing TCEs based on assumption or bias. When WIPO created the first ever fact-finding project[147], there were complaints of insufficient participation

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146 WIPO, 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)' (2001) 110–111.

147 WIPO, 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)' (n 146). This report claims itself as a global, first-hand and IP-related survey of the needs of TK holders: 'While the needs of TK holders have been referred to in other international fora, there has

recorded in the report. The fact-finding team to North America reported the discontent of indigenous participants:

> Indigenous participants demanded "access to the forum and the process: right now it is the Nation State governments that are allowed to speak about intellectual property in relation to indigenous knowledge." They also raised concerns about the observance of indigenous protocols in meetings with indigenous peoples, such as prayers and the offering of tobacco. Based on previous experiences, they expressed reservations that "often forums like this are used to validate a process that is already going on. And we will be used to legitimize the whole process."[148]

The absence of substantial participations of indigenous groups in the production of WIPO's reports was criticised from the beginning of WIPO's project of TK and TCEs but it is still an issue.[149] For example, Jane Anderson quoted a discussion in a panel regarding the protection of TCEs[150] to exemplify that 'it is enough that the "traditional knowledge" issue is on the agenda, but it is not engaged with any real sensitivity or particularity.'[151]

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been to date no systematic global exercise by international organizations to document and assess, first-hand, the IP-related needs of TK holders.' See: ibid 17.

148 WIPO, 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)' (n 146) 128–129.

149 Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters* (Routledge 2014) 169–170; Chidi Oguamanam, 'Ramifications of the WIPO IGC for IP and Development' in Daniel F Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge 2017) 343.

150 'Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources Symposium: Global Intellectual Property Rights: Boundaries of Access and Enforcement' (2002) 12(3) Fordham Intellectual Property, Media & Entertainment Law Journal 753.

151 Anderson (n 130) 182.

> Question: My name is Marie Samuel. I am with the NGO Yachy Wasi, based in Peru and New York. I am not indigenous but our constituency is. I am glad to see WIPO is there, but at the same time I have a question. As you know the Permanent Forum of Indigenous Issues has been adopted. I assume that one of the question that they will deal with is traditional knowledge. Now I see that there is a panel of scholars, but you do not have an indigenous representative speaking from their point of view…
>
> Professor Hugh Hansen: May I ask you a question? From which indigenous group should we have had a representative?
>
> Questioner: It could have been any indigenous group.
>
> Professor Hugh Hansen: What would they have said that was not said today or that you did not say?
>
> Questioner: Well it is like speaking about a dead body or something. The person is not there to speak. Apparently none of you are indigenous. It would have been good to have an indigenous point of view. That is my point.
>
> Professor Hugh Hansen: Okay. I might say we did put out a word to invite some NGOs to speak and, for whatever reason it never happened. But there was an invitation. [152]

When being challenged with cultural particularity, the expert's 'abstraction' and 'objection' can avoid the problem. Referring to the discussion about the indigenous representative, Jane Anderson points out the WIPO expert's ambiguous attitude in these international forums: 'local identities might be privileged in making the category legitimate in term of international discussion, but these identities are displaced when they actually threaten to reveal the explicit cultural politics (and prejudices) at play within the global polity'.[153]

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[152] 'Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources Symposium: Global Intellectual Property Rights: Boundaries of Access and Enforcement' (n 150) 793.

[153] Anderson (n 130) 182.

The danger of losing indigenous people's trust has also been pointed out. Many indigenous people are dissatisfied with their position in the discussions of TCE protections. In the IGC, indigenous representatives are just observers.[154] Maui Solomon also mentioned that only four indigenous representatives attended the 2016 WIPO IGC meeting.[155] The keynote speaker at that meeting also reminded that 'that is the same number who came in 1991 when WIPO had no traditional work programme. By comparison there were well over fifty indigenous representatives at the first WIPO Roundtable on IP and Indigenous Peoples.'[156] Therefore, 'this surely presents…a warning signal that the IGC may have lost credibility with many indigenous peoples because of the impasse and blockage that has occurred here and the lack of certainty over the recognition of indigenous peoples as rights holders.'[157]

Finally, according to Jane Anderson's criticism, given that trade issues related to IP were being decided in the WTO forum, in order to remain relevant to the IP issues,[158] WIPO has taken on issues of 'culture', in which indigenous knowledge has been an important

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154 Ahmed Abdel-Latif, 'Revisiting the Creation of the IGC: The Limits of Constructive Ambiguity?' in Daniel F Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge 2017) 27.

155 Maui Solomon, 'An Indigenous Perspective on the IGC', *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge 2017) 226.

156 Aroha Te Pareake Mead, 'Intellectual Property, Genetic Resources and Associated Traditional Knowledge: Sharing Indigenous and Local Community Experiences' (2016) 7–8.

157 ibid 8.

158 Bowrey and Anderson (n 84) 490; Anderson (n 130) 175; Abdel-Latif (n 154) 18–19.

category over the last ten years.[159] However, WIPO 'also deals with culture by isolating it as a particular indigenous trait'[160]: Indigenous people as 'traditional knowledge holders are imagined as existing somewhere outside modernity[161] as they 'create originate, develop and practice traditional knowledge in a traditional setting and context.'[162] In the politics of categorising TCEs in terms of international IP law, WIPO's strategy of culture issue has been criticised. It will be even worse if the participation of indigenous peoples cannot be secured in WIPO's forums and committees.

2.3.3 Indigenous Peoples' Self-Orientalism

It should be noted that not only were Westerners and colonisers influenced by Orientalism, but indigenous peoples and the colonised also unconsciously followed and copied the Orientalist assumption. As Said describes, 'Like any set of durable ideas, Orientalist notions influenced the people who were called Orientals as well as those

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[159] For example, as WIPO introduces its work on the protection of traditional knowledge: 'WIPO's work on the Protection of Traditional Knowledge: In November 1997, the Global Intellectual Property Issues Division (the Global Issues Division) was established by the then newly elected Director General, Dr. Kamil Idris. **The Global Issues Division was created to enable WIPO to remain at the forefront of global IP developments** by responding to three challenges facing the IP system in a rapidly changing world. These challenges were identified as:

-accelerating technological advancement;

-integration of the world economical, ecological, cultural, trading and information systems; and

-the growing relevance of IPRs.

See: ' WIPO, 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)' (n 146) 16. (Emphasis added).

[160] Anderson (n 130) 195.

[161] ibid.

[162] WIPO, 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)' (n 146) 26.

called…Western'[163]. Since the coloniser often denies cultures of the colonised in the coloniser's grand narrative, the colonised resists the colonial discourse by constructing and promoting a single and imagined culture instead. Through their resistance, a culture following the logic of Orientalism may be produced.[164] Fanon reminds us that a new re-imagined African/Asian/South American culture may oppose the idea of an old Europe, but this rebuilt culture may also be harmful to local heterogeneous cultures. As he describes, the efforts of the colonised 'to rehabilitate himself and to escape from the claws of colonialism are logically inscribed from the same point of view as that of colonialism'.[165]

The promotion of 'Black culture' in the era of Fanon is a good reminder. When colonised intellectuals praised 'Black culture' and created the term 'negritude' as a resistant strategy against colonialism, they are following the same logic as their coloniser. A dichotomy has been established: An old Europe and a young Africa. It is well argued that 'the unconditional affirmation of African culture has succeeded the unconditional affirmation of European culture.'[166]

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163 Said (n 102) 42.

164 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books Ltd 2013) 26–28.

165 Frantz Fanon, *The Wretched of the Earth* (Grove Press 1968) 212. For Fanon's discussion regarding the colonised and 'national culture', see: ibid 211–217.

166 Fanon (n 165) 212–213. However, even Fanon has been criticised for essentialising culture and accepting the coloniser and the colonised as 'two forces opposed to each other by their very nature'. He argues that 'decolonization is the meeting of two forces, opposed to each other by their very nature, which in fact owe their originality to that sort of sub-stantification which results from and is nourished by the situation in the colonies.' (ibid 36.) For more on the criticism of Fanon's argument, see: Smith (n 175) 26–28.

In Taiwan, *Bunun's* invention of indigenous traditional dance is another example. According to the *Bunun* elders, *Bunun* people in Taiwan did not dance. In their language, there is no term referring to 'dance'. However, in the government's mind, all indigenous people are good at singing and dancing, so they have to 'invent' indigenous people's dance in order to perform their 'traditional' art to the public. They adopt Western folk dance and the *Amis* dance (the most popular indigenous style of dance in Taiwan) to create an 'indigenous people's dance'.[167] The creation of pan-indigenous culture is the phenomenon which Nocolas Thomas calls 'folkloric reification of culture'[168]. Marshall Sahlins also describes it as 'a worldwide culture movement':

In the Fuji Islands and Tibets, in the Amazon and the Australian outback, in Kashmir and northern Wisconsin, all over the world native peoples are becoming aware—and defensive—of what they call their 'culture". The word itself has spread over the planet: a prise de conscience that is surely one of the most remarkable phenomena in the world history of the later twentieth century. The peoples have discovered they have their own "culture". Before they were just living it. Now their "culture" is a conscious and articulate value. Something to be defended and, if necessary, reinvented.[169]

If indigenous peoples just copy the imagined for them by outsiders, they cannot challenge Orientalism, but just follow or even enforce it. However, since indigenous peoples' culture is not isolated, but keeps renewing, it cannot be denied that indigenous peoples can have

[167] Shu-Yuan Yang, 'Cultural Self-Consciousness and the Reconstruction of Tradition among the Bunun of Taiwan (文化自我意識與傳統的再創造: 以布農人為例的研究)' (2011) 9 (2) Taiwan Journal of Anthropology 55, 56.

[168] Nicholas Thomas, 'Fear and Loathing in the Postcolonial Pacific [Book Review]' (1992) 51 Meanjin 265, 275.

[169] Marshall Sahlins, 'The Economics of Develop-Man in the Pacific' [1992] RES: Anthropology and Aesthetics 12, 24–25.

the power to interact their TCEs with outsiders and simultaneously maintain their subjectivity and negotiating ability. It is even possible to protect an invented tradition under the Protection Act. The *Thao* people's and the *Tfuya* tribe's TCEs will be examples of this, to be explored in Chapters 6 and 7.

2.4 Moving on

In this chapter, the colonial background of the making of IP law and the influence of Orientalism on *sui generis* rights are explored. The legal protection of TCEs is inevitably relevant to the modern state's involvement in indigenous peoples' culture, which is also argued to be in the shadow of colonialism. In the next chapter, the power relationship between the state and indigenous peoples, which may influence the legal protection of TCEs, will be explored.

3 Under the Shadow of Colonialism (II): The Modern State and Indigenous Peoples

The interaction between the state and indigenous peoples is often considered to be a colonial relationship. In the past, indigenous peoples' cultures were the state's targets for repression or assimilation. Nowadays, even if indigenous peoples' rights and culture are recognised by the modern state, it is argued that 'the recognition provided by institutions such as law, government, and cultural policy not only impact indigenous peoples on the ground—they also forge the ways in which they are allowed to "be".'[1]

Presently, many countries retain control over the naming of indigenous peoples and tribes. Using Taiwan as an example, this chapter will briefly introduce the process of how indigenous people gain their official name and legal recognition, and how their decision-making, their customary law, and their representatives are controlled by the state. These regulations are highly related to the protection of TCEs in Taiwan and are argued to be a new wave of the state's control. Drahos worries about the colonial control of indigenous knowledge: '[T]he colonisation of indigenous people was a process of brutal enclosure of *stateless societies* by states. The rise of statutory rule-based regulation of indigenous knowledge systems might represent the final act of enclosure in that long historical

[1] Haidy Geismar, *Treasured Possessions: Indigenous Interventions into Cultural and Intellectual Property* (Duke University Press 2013) 46. Also see: James Clifford, *The Predicament of Culture* (Harvard University Press 1988); Annie E Coombes, *Rethinking Settler Colonialism: History and Memory in Australia, Canada, New Zealand and South Africa* (Manchester University Press 2006).

process'.[2] How indigenous peoples and their knowledge systems are regulated by the statutory regulation will be explored in this chapter in order to see the challenge of legal protection of TCEs at the national level. The recognition of tribes and codification of tribal laws in the US will also be introduced for comparative purposes to represent different modes of the state's control.

3.1 The Naming of Indigenous Peoples

From the perspective of modern state, the legal status of indigenous peoples is not born by nature. In most cases, indigenous peoples' self-assertion regarding their sovereignty and culture cannot guarantee their legal status in the modern state. For example, in the US, Indian tribes have to be recognised by the federal government according to the Procedures for Establishing that an American Indian Group Exists as an Indian Tribe[3] ('the Establishing Procedure'). In Russia, the construction of the category of 'indigenous small-numbered peoples' in the 1993 Russian Constitution was a push from many groups to be 'named' by the state as such, in part so that they could lay claim to certain rights and forms of state support that accompany the status.[4] The official naming of indigenous peoples is also required in Taiwan, under a more severe set of standards and surveillance.

The naming of indigenous peoples is the primary condition for the TCE protection in Taiwan: if a group is not classified as indigenous, it cannot be a claimant for any TCE

[2] Peter Drahos, *Intellectual Property, Indigenous People and Their Knowledge* (Cambridge University Press 2014).

[3] 25 CFR Part 83.

[4] Julia Eckert and others, *Law Against the State: Ethnographic Forays Into Law's Transformations* (Cambridge University Press 2012) 51–52.

protection according to the Protection Act. As Bhabha puts it, quoting Derek Walcott's poem 'Names',[5] which describes 'the pedagogical process of imperialist naming':[6]

> *Being men, they could not live*
> *except they first presumed*
> *the right of everything to be a noun.*

The process of being officially recognised as an indigenous people is a complex process. The status of Taiwanese indigenous peoples cannot be self-claimed but should be examined and approved by the Executive Yuan (行政院), Taiwan's highest administrative branch. The legal definition of indigenous people can be found in Article 2, Paragraph 1 of the Indigenous Peoples Basic Law ('Basic Law'), the law determining indigenous people's fundamental rights in Taiwan:

> Indigenous peoples refer to the traditional peoples who have inhibited in Taiwan and are subject to the state's jurisdiction, including *Amis, Atayal, Paiwan, Bunun, Puyuma, Rukai, Tsou, Saisiyat, Yami, Tsao, Kavalan, Taroko* and any other peoples who regard themselves as indigenous peoples and obtain the approval of the Executive Yuan upon application made by the competent authority in charge of the affairs of indigenous peoples.

According to this article, two conditions should be met for an indigenous people to obtain its legal status: first, they shall identify themselves as an indigenous people; second, the application of official recognition shall be approved by Taiwan's highest administrative

[5] Derek Walcott, *Collected Poems, 1948-1984* (Faber & Faber 1992) 305–308.

[6] Homi K Bhabha, *The Location of Culture* (Routledge 1994) 233.

agency. However, the application for the approval of a new indigenous people cannot be filed by indigenous peoples themselves. It is the Council of Indigenous Peoples,[7] the competent authority in charge of the affairs of indigenous peoples, which holds the exclusive power of filing applications.

Owning no rights of filing applications symbolises the disadvantaged position of Taiwanese indigenous peoples under the modern state's legal framework. Taiwan's plains indigenous peoples, *Pingpuzu* (平埔族), is a case in point, demonstrating the difficulties

[7] The Council of Indigenous Peoples was established in Taiwan's central government in 1996 to be in charge of indigenous peoples' affairs. According to Article 3 of the Organization Act of the Council of Indigenous Peoples (原住民族委員會組織法), the Minister of the Council of Indigenous Peoples shall be an indigenous person. In addition, there are three Deputy Ministers on the Council, two of whom shall be indigenous people. The Council is in charge of the following affairs, in accordance with Article 2 of the Organization Act of the Council of Indigenous Peoples :

1. Integrated planning, coordination and promotion of policies, systems and laws and regulations relating to indigenous peoples.

2. Identification of indigenous persons, recognition of tribal status, and the planning, deliberation, coordination and promotion of the self-governance of indigenous people and of international interactions between indigenous peoples.

3. Preservation and passing on of the education, culture and language of indigenous peoples and the planning, deliberation, coordination and promotion of communication media.

4. Planning, coordination and promotion of health improvements, social welfare, protection of employment rights, employment services and legal services for indigenous persons.

5. Planning, coordination and promotion of the economy, tourism, industries, financial services, residences, infrastructure of tribal regions and protection of traditional intellectual property creations of indigenous people, and the planning, management and guidance of a comprehensive development fund for indigenous peoples.

6. Survey, planning, coordination, protection, utilization and management of the lands, sea areas, natural resources and traditional biodiversity knowledge of indigenous people, and the research, survey, consultation, planning, coordination, publication, recovery of rights and interests and dispute resolution for traditional indigenous fields.

7. Supervision, coordination and promotion of all related indigenous cultural development institutions.

8. Any other affairs in connection with indigenous people.

that indigenous peoples encounter when they request being 'named' by the modern state and claim their legal status.

In 1954, *Pingpuzu* lost the indigenous legal status they had had under Japanese colonial rule because the government, ruled by the Nationalist Party (KMT),[8] found that *Pingpuzu* had been 'civilised' to become like Han-Chinese.[9] From 1990, *Pingpuzu* began to reclaim their identity, but the Taiwan government's attitude was always negative. *Pingpuzu* also received little support from the indigenous groups who have obtained official recognition, because some groups feared that *Pingpuzu* would share the limited resources and benefits distributed by the state.[10]

The *Pingpuzu* thereafter organised many movements. They continuously wrote letters to the Council of Indigenous Peoples and persisted in asking the Council what kind of evidence was required to be submitted in order to gain official recognition. It was easy for the Council of Indigenous Peoples to ignore their letters because the *Pingpuzu* were not granted any rights by law to require the government to recognise their legal status. Subsequently, the *Pingpuzu* filed several lawsuits to the Court of Administrative law and

[8] As mentioned in Section 1.5, Taiwan was colonised by Japan from 1895 to 1945. After Japan surrendered and World War II ended, Japan relinquished its sovereignty in Taiwan. Subsequently, the Chinese Nationalist Party (KMT) came to Taiwan and claimed that it had the legitimate ruling power in Taiwan. With regard to the administrative management of indigenous people, the KMT managed Japan's population census of indigenous peoples and updated it in accordance with KMT's observations.

[9] Jolan Hsieh, *Collective Rights of Indigenous Peoples: Identity-Based Movement of Plain Indigenous in Taiwan* (Routledge 2006) 4.

[10] Scott Simon, 'Review of Collective Rights of Indigenous Peoples: Identity-Based Movement of Plain Indigenous in Taiwan' (2006) 79 Pacific Affairs 535, 535.

failed.[11] Finally, they filed a complaint by letter to the Special Reporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People of the UN Human Rights Council, citing Article 33, Paragraph 1 of the United Nations Declaration on the Rights of Indigenous Peoples: 'Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.' They did not receive any response from the UN, either. *Pingpuzu* has no legitimate position to argue their identity no matter at domestic or international level, and has to wait for the 'good will' of the state and the international organisation.[12] It seems that indigenous people are always the activists of identity politics, but they have hardly ever been the legal subject.

3.2 The Recognition of Tribes

In Taiwan, numerous indigenous **tribes** (*bu luo,* 部落) may belong to one indigenous **people** (*zu*, 族). For example, according to the latest report of the Council of Indigenous People in 2015, there are 127 officially recognised tribes belonging to the *Paiwan* People, 221 recognised tribes belonging to the *Amis* People, and 13 recognised tribes belonging

[11] Hung-kun Duan, 'The Movements of Contemporary Pingpu Indigenous Peoples (1993-2012) 一 A Case Study of Siraya Tribe of Taiwan (當代平埔原住民族運動研究(1993-2012) :以台南西拉雅族為例)' (National Chi Nan University 2013) <http://ndltd.ncl.edu.tw/cgi-bin/gs32/gsweb.cgi/login?o=dnclcdr&s=id=%22101NCNU0010004%22.&searchmode=basic> accessed 9 March 2016.

[12] Some progress of 'good will' has begun from 2017. The Executive Yuan proposed a draft to amend the Status Act For Indigenous Peoples(原住民族身分法), to provide the possibility of legal recognition of *Pingpuzu*. See: The Executive Yuan, 'The Draft Amendments to the Status Act For Indigenous Peoples (原住民身分法修正草案)' (Executive Yuan, Taiwan, 21 August 2017) <https://www.ey.gov.tw/News_Content4.aspx?n=D0675BEBB0C613C7&sms=1B6A34286EEBCD4C&s=9ECB24448A3D5F44> accessed 3 March 2018. However, the legal definition of *Pingpuzu* is still controversial. For the *Pingpuzu*, it is still a long way to struggle to obtain equal legal recognition.

to the *Tsou* People.[13] After a Taiwanese indigenous people is officially recognised, the tribes within this people require further recognition by the state.

According to Article 2, Paragraph 4 of the Basic Law, the term 'tribe' means 'an officially recognised group of indigenous persons who form a community by living together in specific areas of the indigenous peoples' regions and following the traditional norms.' The process of recognising indigenous tribes is that the local government should, at its own discretion or by indigenous people's demand, interview local people who are familiar with tribal history and survey the inhabitants, the living area, the tradition and the ceremonies of tribes.[14] Furthermore, the Council of Indigenous Peoples will review the reports of the local government and determine if the local community can be qualified as an officially recognised tribe.[15]

Unlike the naming and recognition of a specific indigenous people described in Section 3.1.1, the tribes belonging to recognised indigenous peoples have the right to require the government's review and approval of their legal status. *Pingpuzu*'s problem reminds us that it is necessary for indigenous people to own the positive right of requiring the government's recognition. However, even if indigenous peoples are granted the right to

[13] The Council of Indigenous Peoples, 'The List of Recognised Tribes (本會已完成核定並刊登公報之部落一覽表)' (2015) <http://www.apc.gov.tw/portal/docDetail.html?CID=70BB33E603A72F50&DID=0C3331F0EBD318C27663B7B0AC83ABB6>.

[14] See: Article 2, the Regulations of Recognition of Indigenous Tribes.

[15] See: Article 7, the Regulations of Recognition of Indigenous Tribes.

file a petition requesting the state's recognition, it may not be sufficient to empower them to fight against the colonial control from the state.

The US rules in relation to legal status of indigenous people can act as a reference to consider this question. The US government has established a legal procedure of acknowledging indigenous tribes which grants indigenous people the rights of filing application. Being acknowledged by the US government is also influential when Indian tribes hope to protect and manage their own TCEs. Recognised American Indians can govern themselves by tribal laws through their own institution, such as tribal councils, tribal courts, and tribal peacemaking systems.[16] They can enjoy a sovereign status and use their own tribal laws to regulate and protect their own cultural property and TK.

The US Congress passed the Federally Recognized Indian Tribes List Act of 1994, which established that tribes can be federally recognised by an act of Congress, a court ruling or the BIA. As at 2018, there were 567 Native American tribes recognised by the BIA. The Federal Register periodically publishes an annual list of 'Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs'.[17]

[16] Angela R Riley, '"Straight Stealing": Towards an Indigenous System of Cultural Property Protection' 80 Washington Law Review 69, 92.

[17] 'Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs' (*Federal Register*, 30 January 2018) <https://www.federalregister.gov/documents/2018/01/30/2018-01907/indian-entities-recognized-and-eligible-to-receive-services-from-the-united-states-bureau-of-indian> accessed 12 September 2018.

According to the Procedures for Establishing that an American Indian Group Exists as an Indian Tribe ('the Establishing Procedures'), the regulations regarding recognition of Indian tribes are as follows. First of all, note that an 'Indian group' and an 'Indian tribe' are different: 'Indian group or group means any Indian or Alaska Native aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe.'[18] But 'Indian tribe means any Indian or Alaska Native tribe, band, pueblo, village, or community within the continental United States that the Secretary of the Interior presently acknowledges to exist as an Indian tribe.'[19] In other words, an Indian group can be self-claimed, but if an 'Indian group' wants to gain federal recognition and maintain the power of self-governance, it has to be acknowledged to be an 'Indian tribe'.

Secondly, Indian groups can file a letter of intent and a documented petition to advance the legal process according to Article 83.4 of the Establishing Procedures: '(a) Any Indian group in the continental United States that believes it should be acknowledged as an Indian tribe and that it can satisfy the criteria in § 83.7 may submit a letter of intent; and (b)…A letter of intent may be filed in advance of, or at the same time as, a group's documented petition.'

[18] Article 83.1 of the Establishing Procedures.

[19] Ibid.

It should also be noted that the documented petition requires evidence: 'It may be in any readable form that contains detailed, specific evidence in support of a request to the Secretary to acknowledge tribal existence.' (See Article 83.6 (a))

Finally, the Assistant Secretary processes the petition and conducts a substantial review. The review will be based on the factual statements and evidence attached in the petition. The Assistant Secretary may also by its discretion initiate other research.[20] The Establishing Procedures require that the Assistant Secretary publish proposed findings in the Federal Register within one year after its active consideration,[21] but the Assistant Secretary has the discretion to extend the period for the preparation of a final determination.[22]

In Nancy Carter's opinion, 'recognition' is 'a term of art describing federal acknowledgement of a government-to-government relationship between an Indian tribal

[20] § 83.10 (a) Upon receipt of a documented petition, the Assistant Secretary shall cause a review to be conducted to determine whether the petitioner is entitled to be acknowledged as an Indian tribe. The review shall include consideration of the documented petition and the factual statements contained therein. The Assistant Secretary may also initiate other research for any purpose relative to analyzing the documented petition and obtaining additional information about the petitioner's status. The Assistant Secretary may likewise consider any evidence which may be submitted by interested parties or informed parties.

[21] § 83.10 (h) Within one year after notifying the petitioner that active consideration of the documented petition has begun, the Assistant Secretary shall publish proposed findings in the Federal Register.

[22] § 83.10 (l) At the end of the period for comment on a proposed finding, the Assistant Secretary shall consult with the petitioner and interested parties to determine an equitable timeframe for consideration of written arguments and evidence submitted during the response period. The petitioner and interested parties shall be notified of the date such consideration begins…(3) The Assistant Secretary has the discretion to extend the period for the preparation of a final determination if warranted by the extent and nature of evidence and arguments received during the response period. The petitioner and interested parties shall be notified of the time extension.

entity and the United States. Federal recognition is a watershed legal determination affecting all manner of tribal rights, privileges, and obligations.'[23] However, the process by which the government examines and researches the evidence supporting the status of indigenous peoples can hardly support an equal, negotiating and government-to-government relationship, regardless of whether this process is conducted in the US or in Taiwan. In the US, the Assistant Secretary initiates its own research and investigates the evidence provided by the petitioner and interested parties. In Taiwan, the reviewers of applications are the scholars and experts appointed by the regulatory authority. They are top-down processes, and indigenous peoples' self-claim is not influential in either of these processes of recognition.

Moreover, the government's review period has never been controlled by indigenous people. The federal acknowledgement process of the US can take years, even decades. For example, the Shinnecock Indian Nation formally petitioned for recognition in 1978 and was recognised 32 years later, in 2010.[24] The Chickahominy Tribe, which has been seeking federal acknowledgement for 20 years, is still waiting for a decision.[25] The federal acknowledgement process has been described as 'broken, long, expensive, burdensome, intrusive, unfair, arbitrary and capricious, less than transparent, unpredictable, and

[23] Nancy Carol Carter, 'American Indian Tribal Governments, Law, the Courts' (2000) 18 Legal References Service Quarterly, note 1.

[24] 'Shinnecock Indians Facts' <https://native-american-indian-facts.com/Northeast-American-Indian-Facts/Shinnecock-Indian-Facts.shtml> accessed 8 August 2018.

[25] Twenty years from their filing of petition, but in the website of the Chickahominy Tribe, the tribe declares: 'we have waited more than 400 years for federal recognition of our tribe, but we believe that day is coming soon.' See: Chickahominy Tribe, 'Chickahominy Indian Tribe' <http://www.chickahominytribe.org> accessed 8 August 2018.

subject to undue political influence and manipulation, and [it was] noted that Congress has done little to improve things.'[26]

Based on the observations above, it is clear that the modern state and indigenous peoples are not equal in the process of recognition of indigenous tribes. Even if the tribes are recognised, the range of the tribe's self-governance will be based on the laws made by Congress, rather than equal negotiation and mutual agreement between the state and recognised tribes. In Taiwan, Article 4 of Indigenous Peoples Basic Law prescribes, 'The government shall guarantee the equal status and development of self-government of indigenous peoples and implement indigenous peoples' autonomy in accordance with the will of indigenous peoples. **The relevant issues shall be stipulated by laws**.' (Emphasis added). In the US, the Congress law defining the degree of self-government also began from the 'Tribal Self-Governance Act of 1994' (Public Law 103-413).[27]

To sum up, the strict examination and the inefficient process of recognition of indigenous tribes represent an unequal power relationship between the state and indigenous peoples. Moreover, the implementation of self-government of indigenous tribes is only at the state's grace rather than its duty oriented from the government-to-government

[26] Gale Courey Toensing, 'Federal Recognition: Can the BIA's Acknowledgment Process Be Fixed?' (*Indian Country Today Media Network*, 8 August 2012) <http://indiancountrytodaymedianetwork.com/2012/08/08/federal-recognition-can-bias-acknowledgment-process-be-fixed-127942>.

[27] On October 25, 1994, the 'Tribal Self-Governance Act of 1994' (Public Law 103-413) was passed and signed into law by President Clinton. On August 18, 2000, President Clinton signed the 'Tribal Self-Governance Amendments of 2000' (Public Law 106-260), which creates a permanent Self-Governance programme within the Department of Health & Human Services. See: Jamestown S'Klallam Tribe, 'Self Governance' <http://www.jamestowntribe.org/programs/self_main.htm> accessed 8 August 2018.

relationship. Similarly, the examination and registration of legal protection of TCEs generates the same doubt of the unequal relationship between the state and indigenous peoples. In Taiwan's context, how the Protection Act responds to (and fail to respond to) the ideal of equal status between the government and indigenous peoples will be explored in Part 3. Furthermore, Part 4 will discuss revising the Protection Act in order to shorten the period of examination and to pursue the equal status between the state and indigenous peoples.

3.3 The Regulation of Tribal Meetings

Maintenance of self-government is very essential after an indigenous tribe is recognised by the state. It is obvious that the decision-making platform, which seeks to achieve consensus among the tribal inhabitants, is an important component when a tribe practices its self-determination and self-governance. Moreover, TCEs are often owned and managed by tribes, so it is necessary to guarantee the decision-making platform where tribal members can deal with the matters related to TCEs. Taiwan's governmental regulations regarding tribal decision-making will be explored in this section to exemplify the shadow of colonialism related to the state's involvement in tribal self-government.

Historically, different tribes own and use their unique traditional decision-making process to reach their consensus. Tribal consensus was not necessarily based on the majority rule. For example, the disputes and disagreements in *Paiwan* were solved by the tribal highest leader, *Mamazangiljan* (傳統領袖),[28] while in *Tao* they were solved by

[28] Chin-Sheng Wu, 'Research on the Impact of the Aboriginal Leaders Play Down the Cultural Preservation—A Study of the East Paiwan Tribe Tjaqau Case' (National Taitung University 2011) 29.

tribal elders.[29] However, after the KMT took over Taiwan from Japan in 1945, the traditional decision-making platform was gradually replaced by the Meetings of the Village Residents (村民大會), established by the government according to the Local Government Act (地方制度法).[30] In 2006, the Council of Indigenous Peoples issues the administrative regulation, *The Implementation Rules of Tribal Meetings* (原住民族委員會推動原住民族部落會議實施要點), to help indigenous peoples to recover their platform of self-government.[31] Since tribal consensus may deal with important issues that influence both tribal members and outsiders, tribal decision-making became the target that the government tried to regulate. This was not only because the government hoped to guarantee a fair process of negotiation and decision-making in the tribe, but also because the government would like to set up strict rules in order to make sure of the validity and fairness of decisions for outsiders who may be influenced by the tribal decision-making.

In 2016, in order to guarantee the practice of indigenous peoples' informed consent, the Council of Indigenous Peoples issued an administrative regulation, *The Regulations of Consulting, Consent and Participation of Indigenous Tribes* (諮商取得原住民族部落同意參

[29] Indigenous Peoples Commission, Taipei City Government, 'Yami's Tribal Organisation (雅美族部落組織)' (*Taiwan's Indigenous Peoples Portal*, 2009) <http://tcgwww.taipei.gov.tw/ct.asp?xItem=669289&CtNode=16907&mp=cb01> accessed 8 August 2018.

[30] The meeting of the village residents is based on Article 60 of the Local Government Act: 'Villages may convene meeting of the village residents or meetings on local construction projects. The implementation procedures of such meetings shall be formulated by the special municipalities and counties/cities.'

[31] The former Minister of the Council of Indigenous Peoples, Walis Perlin, describes his primary goals to issue the administrative rules in order to recover the tribal meeting. see: TITV, *What Is the Role of Tribal Meetings? (部落會議：位階與權限功能在哪裡?)* (2013) <https://www.youtube.com/watch?v=Dlq7I5n6Wvk> accessed 5 March 2018.

與辦法, 'the Regulations of Participation').[32] The regulations prescribe that the tribal meeting is the highest authority of indigenous tribes[33] and set out under what circumstances the tribe should hold the tribal meetings.

The governmental regulations of tribal meetings ignore diverse styles between different tribes. In addition, according to the Regulations of Participation, there are two levels of tribal meetings that invite different levels of governmental surveillance. The more influential the tribal decision is, the stricter the regulations from the government will be. The logic sounds reasonable, but when it comes to tribal meetings, the traditional decision-making platform may be artificially altered or abolished due to the government's surveillance. For the tribe, separating the legitimacy of tribal meetings from the tribe's cultural context is also questionable. Detailed analysis of the regulations of tribal meeting in this section will help us to observe the state's control over tribal decision-making.

3.3.1 Tribal Meetings for Consent Agenda

The first category of tribal meetings concerns those that are held for informed consent agenda. In this case, when it is held for consent agenda in accordance with Article 21 of the Basic Law, the tribal meeting will be monitored through a higher degree of regulation:

[32] After the Council of Indigenous Peoples announced the Regulations of Participation on January 4, 2016, the previous regulations of 2006, the Implementation Rules of Tribal Meetings, was abolished on January 25, 2016, because the new regulations cover the issues prescribed in the previous one. See: The Council of Indigenous Peoples, 'Information regarding Tribal Meetings' (*The Council of Indigenous Peoples*, 2016) <https://www.apc.gov.tw/portal/docDetail.html?CID=A1864933BA739E5A&DID=0C3331F0EBD318C29FEC73559EBD6474> accessed 5 March 2018.

[33] See: Explanations for Article 5 of the Regulations of Participation.

(i) When governments or private parties engage in land development, resource utilisation, ecology conservation and academic research in indigenous peoples' land, the tribe and its adjoin-land owned by the government, they shall consult, and obtain consent of, indigenous peoples or tribes, or invite their participation. They shall also share benefits with indigenous people. (ii) In the event that the governments, laws or regulations impose restrictions on indigenous peoples' utilisation of the land in preceding paragraph and natural resources, the government shall consult with indigenous peoples, tribes or indigenous people and obtain their consent.[34]

In the essential issue of resources and indigenous land, indigenous people's consent is always a battlefield full of struggles of different interest groups within and outside the tribe. The Regulations of Participation try to balance different and sometimes conflicted purposes: the fairness of the tribe's consent, the protection of a third party's interests, and the possibility of recovering the traditional decision-making platform.

(1) The Very First Meeting

The first tribal meeting based on the Regulations of Participation shall draft the tribal 'Articles of Association', and the draft shall be approved by the participants of the tribal meeting.[35] The process of commencing the first meeting has been simplified compared to the previous 2006 rules, the *Implementation Rules of Tribal Meetings regulations,* after the

[34] This article responds to Article 32, Paragraph2 of the UN Declaration on the rights of indigenous peoples : 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.'

[35] See: Article 7 of the Regulations of Participation.

Council of Indigenous Peoples received many tribes' complaints regarding the complicated process.[36] According to Article 6 of the Regulations of Participation, the promoter of the first meeting shall be, in order of priority: (1) the traditional leader, (2) the representative of the household or clan, or (3) the tribal member. The priority of the traditional leader as the promoter in Article 6 shows the Council of Indigenous Peoples' concern over the tribe's customary law. Tribal custom here is not only to be respected but also promotes the efficiency of the tribal meeting.

(2) Applications and Documentation

Applications and documentation play an important part in the process of a tribal meeting for consent agenda. First of all, the Article of Association approved in the first meeting shall be recorded in a written document and be made available to public.[37] It shall also be submitted to the local government for its documentation purposes.[38]

Before a strict tribal meeting is held in order to discuss and vote on the consent issue regarding the tribe's land and environment, the applicant should file the application to the local government for the government's permission to hold the tribal meeting. The applicant shall be the government or the person who handles the affairs requiring indigenous people's informed consent,[39] so the applicant may not be the indigenous

[36] See: the Explanations for Article 6 of the Regulations of Participation.

[37] See: Article 8 & 10 of the Regulations of Participation.

[38] See: Article 8 of the Regulations of Participation.

[39] See: Article 2 of the Regulations of Participation.

people. The potential applicants include an academic researcher who conducts research regarding indigenous people's resource, a local government that needs to make a law or to execute a policy regarding indigenous land, or an enterprise that plans to buy and develop the land around the tribe.

The applicants should report which issue they plan to consult about and seek for consent. The tribe shall strictly follow the rules provided by the Council of Indigenous Peoples on holding a tribal meeting for consent agenda. It cannot follow a traditional decision-making process even if the tribe has recognised the power of the traditional decision-making platform and authorises the traditional leader or the elders to decide the public affairs in the Articles of Association.[40] [41]

The application to the local government should explain: (1) the consent agenda, (2) the plan and institution of benefit-sharing and of indigenous peoples' participations/co-management, and (3) any other relevant matters regarding the consent agenda.[42] The government will determine which are the interested tribes, and will notify the upcoming tribal meetings to the interested tribes with thirty days' notice.[43]

[40] The Council of Indigenous Peoples' explanations for Article 12 of the Regulations of Participation mentions, 'The tribal meetings for consent agenda is the special process, so the Regulations of Participation shall be exclusively applied. The rules with regard to the tribal meetings for consent agenda prescribed in the Regulations of Participation cannot be excluded or exempted by the tribe's Articles of Association. The priority of the Regulations is hereby confirmed and emphasised.'

[41] The authorisation to the traditional leader or the elders can only be allowed with respect to general public affairs, see: Section 3.3.2.

[42] See: Article 13 of the Regulations of Participation.

[43] See: Article 13 & 14 of the Regulations of Participation.

The chairman of the tribal meeting shall notify in writing the applicant and tribal members fifteen days in advance of the tribal meeting. The notice is allowed to be written in both Chinese and native language of the tribe.[44]

The consent agenda is usually the most influential issue in the tribe. For the government, the strict regulations can balance the interests between the applicant and the interested tribes and secure a fair process for each party. However, as mentioned above, the most important informed consent agenda is also the most essential part of indigenous people's self-governance. Ironically, facing the essential part of their self-governance, indigenous tribes cannot discuss it through their original decision-making process. Consequently, the more serious attitude the government holds towards these 'important issues', the more rapidly the government's rules and regulations may destroy the foundation of the tribe's self-governance.

3.3.2 Tribal Meetings for General Public Matters

The second category of tribal meeting is the tribal meeting for general public affairs. According to the Regulations of Participation, general public matters mean the matters negotiated and decided by tribal members in order to represent the tribe's consensus to be announced to the public, especially outsiders.[45] In the area of general public affairs, the tribe can choose to decide the matters according to its Articles of Association or follow

[44] See: Article 17 of the Regulations of Participation.

[45] See: Article 2, paragraph 4 of the Regulations of Participation.

the majority rule.[46] Therefore, if the tribe's Articles of Association recognise the authority of their traditional decision-making platform, the government will recognise the validity of such decision-making and the demand of majority rule shall not be applied.

In addition, according to Article 5 of the Regulations of Participation, the Articles of Association can directly authorise the traditional leader, the elders, or the leading groups in the tribe to determine public affairs according to tribal custom.[47] However, this authorisation cannot be confirmed orally even though there is the existing system of oral authorisation based on the tribe's tradition. Only the authorisation written in the Articles of Association is deemed legally effective.

In the case where some tribes have not yet had the ability to rebuild the traditional decision-making platform, the basic articles to regulate the meeting for general public affairs are still provided by the Council of the Indigenous Peoples.[48] According to Article 23 of the Regulations of Participation, tribal meetings shall be held twice per year.[49] In addition, in order to maintain a fair decision-making platform and external validity, the government requires meeting minutes to be kept and the participants' signature of attendance.[50] The written document to prove the existence of a tribal meeting, no matter if the platform of consensus is traditional or not, is essential for the government. Through

[46] See: See: Article 23 of the Regulations of Participation.

[47] See: Article 10 of the Regulations of Participation.

[48] See: the Explanations for Article 23 of the Regulations of Participation.

[49] See: Article 28 of the Regulations of Participation.

[50] See: Article 29 of the Regulations of Participation.

governmental controls on both major and minor issues, the tribe's traditional decision-making structure will be gradually transformed due to the government's instruction and documentation.

The Regulations do not prescribe that tribal meetings for general public affairs can generate immediate legal effect for any outsider to obey, but it is observed that the results can be respected if the tribe can maintain a solid social structure and prove their subjectivity to the outsiders and the government.

3.3.3 Tribal Meetings regarding the Issues of TCEs

The protection of TCEs is deeply relevant to the tribal decision-making platform. On the one hand, the registration of TCEs and the consequent benefit-sharing both require the tribal meeting's discussion and consensus. Fortunately, compared to the regulations introduced in this section, the Protection Act has relaxed regulations of tribal meetings to facilitate tribal consensus. It has been observed that when the platform of tribal consensus is solid, their ability of negotiation with the state and outsiders will be stronger and therefore better able to support the protection of TCEs. The process of establishing the tribal meeting under the Protection Act will be further explored in Chapter 5.

On the other hand, the tribal members' desire to protect their own TCEs becomes the motivation to rebuild their traditional platform. For example, the famous dispute of copyright infringement between the *Amis* tribe and the German band *Enigma* mentioned

in Section 2.3.1 was ironically an event that stimulated the *Amis* tribe *Malan*[51]to rebuild their traditional meeting house (in *Amis* language: *'sefi'*). When the Olympics in Atlanta, US adopted Enigma's song 'Return to the Innocence' as the theme song to a video advertisement and the legal dispute became known by tribal people, the *Malan* tribe became aware that their folksongs could be internationally popular.[52] This famous dispute was one of the reasons that the *Amis*'s meeting house was rebuilt after more than forty years' lost,[53] along with some other important reasons, such as the new mayor's interests in *Amis* culture,[54] indigenous peoples' movements,[55] and the founding of the Council of Indigenous Peoples.[56]

It should be noted that the tribal meeting is a dynamic and ongoing process. Some traditional decision-making platforms will disappear, but some will be revived. On the other hand, the state's regulations of tribal meetings face many challenges in order to balance third party interests and indigenous peoples' self-governance. The case study analysed in Chapter 5 will further explore the relaxation of governmental control in the

[51] The *Malan* tribe is the more well-known name for the English world, so it is used in this research. But the name of the tribe in the tribe's native language should be *Falangaw* or *Valangaw*.

[52] Chun-Yen Sun, 'The Research of the Polyphonic Songs of Malan Amis Tribe (阿美族馬蘭地區複音歌謠研究)' (Soochow University 2001) 154–159.

[53] Yu-Fen Lee and Shu-Chuan Kao, 'Malan Amis' Traditional Men's Houses and Their Central Role in Tribal Society (台東市馬蘭社阿美族的傳統聚會所與部落社會的中心性)' (2005) 10 The Journal of Eastern Taiwan Studies (東台灣研究) 65, 96.

[54] ibid 97.

[55] ibid 96.

[56] ibid 95–96.

Protection Act and the mutual reinforcement between tribal meetings and the legal protection of TCEs.

3.4 The Status of Customary Law

The fourth issue discussed in this chapter is the modern state's involvement in tribal customary law. The importance of customary law in the protection of TCEs has been emphasised by the WIPO for many years and figures prominently in the WIPO's first fact-finding report.[57] According to WIPO's understanding, the idea of customary law concerns 'the laws, practices and customs of indigenous peoples and local communities.'[58] In WIPO's first fact-finding report, WIPO quoted the opinion of the Australian Copyright Council: 'What is now advocated by Indigenous communities is protection of traditional cultural expression by the application of customary intellectual property law on its own terms, as of right.'[59]

From the state of fact-finding, WIPO has noticed the importance of customary law.[60] WIPO recognised that customary law can serve at least ten functions in the area of the

[57] WIPO, 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)' (2001) 57–65.

[58] WIPO, 'Customary Law, Traditional Knowledge and Intellectual Property: An Outline of The Issues' (2013) 4 <http://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf>.

[59] WIPO (n 57) 57.

[60] However, IGC's attitude towards customary law should be further observed in the future. Recently, IGC's attitude towards customary law has become ambiguous. From the preliminary stage of fact-finding and the first session of IGC, WIPO has recognised that the interface between customary law and intellectual property is a key issue. However, although more research on customary law has been demanded by many countries, no substantial reports have been done by the WIPO. See: WIPO (n 57) 77, 83; Brendan Tobin, 'Now You See It Now You Don't: The Rise and Fall of Customary Law in the IGC' in Daniel F Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property*

protection of TCEs These ten functions are listed in WIPO's 2013 report *(Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues)* as:

(1) The fundamental legal basis or source of law for indigenous peoples and local communities' legal rights over TK or TCEs.

(2) A factual element in establishing indigenous peoples and local communities' collective rights over TK or TCEs.

(3) One element of the definition of TK or TCEs, or can otherwise establish the relationship to indigenous peoples and local communities that is central to the concept of TK and TCEs.

(4) A means of determining or guiding the procedures to be followed in securing indigenous peoples and local communities' free prior informed consent.

(5) The basis of specific user rights or exceptions, exempting the continuing customary uses and practices from other legal restrictions on the use of TK or TCEs.

(6) Guide for the assessment of cultural or spiritual offence or damage caused by inappropriate forms of use of TK or TCEs.

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and Genetic Resources, Traditional Knowledge and Folklore (Routledge 2017) 192,201,203. Additionally, by 2014, most references to 'customary law' had been deleted and replaced by 'cultural norms and practice' instead. Tobin suggests that,

…the term "cultural norms" is not defined in the draft instruments or in the extensive glossary prepared by WIPO for the IGC. It appears to be a sociological rather than a legal term…. It…at best demonstrates a lack of understanding on the part of IGC member states and Secretariat that the term, unless precisely defined in the text of the draft instruments to cover the laws, customs and traditions of Indigenous peoples and local communities' legal regimes, and at least their customary laws, will have virtually no legal significance. At worst, the use of the term may demonstrate an attempt to beguile participants in the IGC into believing that references to 'cultural norms' are legally equivalent to and interchangeable with specific recognition of Indigenous peoples and local communities' laws and protocols. It is not and its use would appear to neutralise the influence of Indigenous peoples and local communities' customary and other laws on the development and future implementation of the IGC instruments.

See: ibid 207. Neutralising or degrading the value of indigenous people's legal systems is often the strategy of the member states. These actions in IGC may also 'evidence a growing resistance by some states to the increasing recognition of Indigenous peoples and local communities' legal regimes in international legal instruments.' See: ibid 192. It should be further examined whether IGC's ambiguity of customary law creates a new strategy to negotiate the interests of indigenous peoples and the state, or whether the ambiguity is purely the ignorance of indigenous peoples.

(7) A determinant of or guide for how benefits from the use of TK or TCEs should be equitably shared within a community.

(8) A means of determining appropriate forms of remedies, sanctions or restitution following the breach of rights over TK or TCEs.

(9) An avenue for resolving disputes over ownership or other forms of custodianship over TK or TCEs.

(10) A guide on the transmission of rights over TK or TCEs from one generation to a following generation.[61]

According to these functions, customary law has been recognised to be a social and legal background supporting the legal protection of TCEs – from the definition and maintenance of TCEs, the assessment of inappropriate use, to the platform for resolving dispute.

Moreover, the revitalisation of tribal laws is an opportunity to balance the power relations between dominating IP law and local communities.[62] Even if the importance of preserving TCEs has been fully discussed in the IGC forum, it can be argued that the protections of TCEs based on the international and national regimes is a top-down model, and in many respects, the results have not corresponded to indigenous people's needs.[63] The top-down model has also been criticised by academics, activists and indigenous peoples because it imports Western IP regimes into indigenous communities and may

[61] WIPO (n 58) 4.

[62] See: Riley (n 16); Erica-Irene Daes, 'Intellectual Property and Indigenous Peoples' (2001) 95 American Society of International Law Proceedings 143.

[63] Riley (n 16) 82–86.

destroy the system of local value and cultures.[64] Therefore, many researchers contend that recognition of customary law can assure the development of rights over TK without distorting the cultural bases of indigenous peoples[65] and argues that 'tribal law should be applied as the ultimate determinant of rights and responsibilities in relation to indigenous cultural and intellectual heritage.'[66]

However, customary law is also a term under the shadow of colonialism. As Chanock suggests,

> in the large parts of the world colonised by Western powers, customary law developed in a relationship between colonised peoples and the colonial state…customary law became a form of conversation between the colonialism's subjects and the colonial state about the colonised peoples' long-standing rules.[67]

The state may downgrade indigenous peoples' custom, or recognise its status by codifying customary law, but the customary law remains the term symbolising the power of modern state involved in the tribe's legal and culture structure. Sections 3.4.1 and 3.4.2 will

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[64] ibid 86.

[65] Brendan Tobin, 'The Role of Customary Law and Practice in the Protection of Traditional Knowledge Related to Biological Diversity' in Christoph Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International 2009) 128.

[66] Riley (n 16) 90; Daes (n 62) 147.

[67] Martin Chanock, 'Branding Identity and Copyrighting Culture: Orientations towards the Customary in Traditional Knowledge Discourse' in Christoph Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International 2009) 178–179.

analyse the state's ignorance and recognition of customary law and observe the shadow of colonialism performing in these two attitudes.

3.4.1 Ignorance of Customary Law

In regard to the relationship between the state's law and customary law, tribal customs have been recognised by the state's courts in some countries under certain conditions. Taiwan's Civil Code, Article 1 prescribes that 'if there is no applicable act for a civil case, the case shall be decided according to customs.' Article 2: 'Only those customs which are not against public policy or morals shall be applied to a civil case.' As a country of civil law system, Taiwan's tribal customs can only serve as a supplement when no applicable codified law can be found in a civil case.

Tribal customs are the basis for the existence of tribes. If the state denies its validity, the tribe will gradually lose its subjectivity. The coloniser's power to enforce a single standard of laws has been called a 'legal violence'.[68] In the context of tribal laws interacting with the state law, there are two circumstances of legal violence to be considered. One is that the state's law prohibits the behaviours that tribal customs allow. In this case, indigenous people have to give up their traditional behaviours for fear that they will be punished by the state's law, and the authority of tribal laws will be decreased. An example is that indigenous peoples were forbidden from traditional hunting due to the state's law regarding wildlife conservation.

[68] Tay-Sheng Wang, '"Legal Violence" of the Japanese Colonial Authorities in Taiwan and Its Historical Appraisal' 25 The Journal of History 2.

The other circumstance is when the state allows/legalises a behaviour that was forbidden by tribal customary laws. For example, the customary law may have its own incest taboo, and its prohibited degree of kinship may be stricter than what is forbidden in the modern state's civil code. People in tribes will receive a hint that even if you do not follow the tribal rules, you will not be punished.[69] Gradually, tribal people will begin to doubt their tribal laws and lose their willingness to abide by tribal laws. It is certain that the authority of tribal rules is also withering under this circumstance. Some anthropologists claim that the latter circumstance is more powerful to cause damage of tribal law's authority than the former.[70]

3.4.2 Codification of Customary Law

As mentioned above, using symbols of modernity to repress the locality, the state has constructed a modern law system to replace tribal customs and maintain colonialism in indigenous tribes. However, even when the state is willing to recognise tribal customary laws, the state's willingness can also become a colonial mechanism. As Geinsmar describes with respect to Vanuatu's customs (*Kastom*), '*Kastom* is a local term that provincializes the concept of the traditional by reframing ideas about native tradition within a specifically Melanesian nation-building project.' Moreover, recognition of tribal

[69] Shih-Chung Hsieh and others, 'The Collections of the Indigenous Peoples' Traditional Customs and the Evaluation of Their Being Recognised by the State Law: Atayal and Truku (原住民族傳統習慣之調查整理及評估納入現行法制委託研究--泰雅族、太魯閣族)' (The Council of Indigenous Peoples 2007) 151–152 <http://www.apc.gov.tw/portal/docDetail.html?CID=217054CAE51A3B1A&DID=0C3331F0EBD318C21DB57E7E8A972468>.

[70] ibid 152.

laws often requires tribal customs to be transformed into more reliable and understandable legal resources for the courts and the non-indigenous people. Therefore, codifying customary laws and establishing modern tribal courts often become inevitable.

However, codification of tribal customs is also under the shadow of colonialism. It has been argued that 'this would turn customary law into positive law, undermine its dynamic nature, and open the doors for external legal interpretation and progressive limitation and exhaustion of customary law.'[71] In some cases, customary laws were written down by lawyers rather than by traditional authorities or traditional leaders.[72] It is even argued that the state's recognition of customary law may lead to the death of it. As Kuruk comments, 'once customary is codified or settled by judicial decision, its binding force then depends on the statute or the doctrine of precedent; it ceases to be customary law.'[73]

In Taiwan, no tribal customary laws have officially been codified. The Council of Indigenous Peoples appointed legal and anthropological scholars to collect tribal customary laws of different indigenous peoples and to research the possibility of tribal

[71] Tobin, 'The Role of Customary Law and Practice in the Protection of Traditional Knowledge Related to Biological Diversity' (n 65) 148. Alse see: Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters* (Routledge 2014) 176.

[72] For example, the 'Rules of Use of the Collective Right "Mola *Kuna* Panama"' was drafted by indigenous lawyers, see: Anna Friederike Busch, *Protection of Traditional Cultural Expressions in Latin America: A Legal and Anthropological Study* (Springer 2015) 153.

[73] Paul Kuruk, 'The Role of Customary Law under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge' (2007) 17 Indiana International & Comparative Law Review 67, 112.

laws' integration into the state's law.[74] However, these collections are academic reports rather than codified tribal laws.

The US case of codification of tribal custom is used for a reference to examine the argument regarding the codification of customary law. In Federally-recognised American Indian tribes, a Constitution-like check-and-balance system is often established, with the powers of executive, legislative and judicial branches. After the Indian Reorganization Act of 1934, tribes were encouraged to enact 'written constitutions.' But it was not until the 1960s that tribal laws accumulated rapidly into well-organised codes.[75] Larry Nesper describes the transformation of Indian tribes: 'the interaction between American Indian activism and changes in federal Indian policy since the 1960s has transformed American Indian tribes from largely powerless and impoverished kinship-based communities into neo-colonial state-like entities.'[76] He also points out that 'neocolonial state-like entities' are carried out by the process entailing the codification of law and the development of courts, which are 'two of the ways in which the state appears in everyday and localized forms'.[77]

The Navajo Nation can be used as an example to further explore the relationship between the codification of customary laws and neo-colonialism. In 2002, the Fundamental Laws

[74] For example. Hsieh and others (n 69).

[75] Robert D Cooter, 'American Indian Laws Codes: Pragmatic Law and Tribal Identity' (2008) 56 The American Journal of Comparative Law 29, 31.

[76] Larry Nesper, 'Negotiating Jurisprudence in Tribal Court and the Emergence of a Tribal State: The Lac Du Flambeau Ojibwe' (2007) 48 Current Anthropology 675, 675.

[77] ibid.

of the Diné ('FLD') were codified and written into the Navajo Nation Code. The Navajo Nation Code, established in 1962, is a document that includes governmental powers, laws, resolutions and council procedures in the Navajo Nation, while FLD is rooted in Diné principles and cultural knowledge.[78] It is argued that 'the transfer of knowledge from oral into written, printed and electronic forms requires movement across cultures and symbolic translations of ideas'[79], so the authenticity of codified tribal laws is questionable. Moreover, many critics disagree with the codification of the FLD, because 'FLD is now laden with Western concepts of rights, freedoms and self that do not reflect original Diné thought and experiences.'[80] These critics argue that using codification of tribal customs is the modern state's approach that limits the true goal of decolonisation.[81]

To summarise, ignoring tribal customary laws is to repress the foundation of indigenous people's living culture, but recognising and codifying tribal laws also limits the power of decolonisation and encounters a new wave of colonisation. We can see the difficulties of decolonisation: both sides can be captured by the modern state's colonialism.

In order to respond to the dilemma, the term 'customary law' should be regarded as a mediating term for indigenous people to claim the recognition of their laws to the

[78] Lloyd L Lee, 'The Fundamental Laws: Codification for Decolonization?' (2013) 2 Decolonization: Indigeneity, Education & Society 117, 121.

[79] David Downes and Sarah Laird, 'Community Registries of Biodiversity-Related Knowledge: The Role of Intellectual Property in Managing Access and Benefit' (Prepared for UNCTAD Biotrade Initiative 1999) 4.

[80] Lee (n 78) 122.

[81] ibid.

coloniser. The assertions of customary law 'are not statements about regularity in past practices, but attempts to negotiate both present and future.'[82] Moreover, to the greatest extent possible, any research, collection, documentation and codification of customary law should be a bottom-up project and carried out by indigenous peoples.[83] During the interaction between indigenous peoples and the state, customs should represent not only a claim about traditional practices, but statements about identity, autonomy and self-determination made by indigenous peoples. The aim of using customary law in the protection of TCEs should be that customary law is regarded a mediating term and supports a fair process of cultural translation between the modern state and indigenous peoples.

The importance of customary law is regularly mentioned in the national, regional and international forums of TCE protection, but the real challenge is, as Chanock asks, 'How can a bridge be built between these disparate bodies of law and their respective decision-making bodies?'[84] Can we transform customary law into a mediating term? As a case study, how the indigenous peoples in Taiwan use their own customary law and the Protection Act to respond to the shadow of colonialism performed in the protection of TCEs will be further explored in Part 3.

[82] Chanock (n 67) 180.

[83] Brendan Tobin, 'The Role of Customary Law in Access and Benefit-Sharing and Traditional Knowledge Governance: Perspectives from Andean and Pacific Island Countries' (World Intellectual Property Organization and United Nations University 2013) 91; Tobin, *Indigenous Peoples, Customary Law and Human Rights* (n 71) 178.

[84] Chanock (n 67) 128.

3.5 The Appointment of Indigenous Peoples' Representatives

3.5.1 Representation and Re-presentation

Registration of TCEs requires two meanings of representation. First, the **representative** of the indigenous group is often required by law to be the contact person in charge of the affairs of registration and benefit-sharing. Second, TCEs are intangible, and mostly transmitted by oral culture, but once TCEs are registered, the description, analysis and documentation of TCEs in the registration system will be an issue of **re-presentation** of TCEs.

There have been many comments within the field of identity politics reminding us that construction and representation of a subject, such as 'People' or 'Woman', inevitably excludes multiple differences in the group. Furthermore, Spivak analyses two different ideas of 'representation', which often confuse many critics: 'representation as "speaking for," as in politics, and representation as "re-presentation," as in art or philosophy.'[85] As mentioned above, the two meanings of representation have been presented in the process of registration of TCEs. In the case of Taiwan, the Protection Act requires that a representative shall apply the registration of TCEs on behalf of his or her tribe,[86] which

[85] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press 1999) 256.

[86] According to Article 6, Paragraph2 of the Protection Act, 'The applicant…is limited to indigenous tribes or people and a representative shall be elected to take care of all matters arising. The regulations of electing representatives shall be determined by the competent authority.' Therefore, the Council of Indigenous Peoples stimulated the regulations of electing representatives, which were prescribed in Article 3 of Regulations Governing TCEs: 'the representative shall be an

indicates the first meaning of representation (speaking for, as in politics). Indigenous peoples survey, portrait, and record their TCEs and represent their TCEs in the application form, which is the second meaning of representation (re-presentation, as in art and philosophy). Therefore, it is helpful to analyse Spivak's perspectives of representation in detail and explore the shadows of colonialism in both meanings of representation.

Spivak suggests that many scholars confuse different meanings of 'representation':

> Immense problems are buried in the differences between the "same" words: consciousness and conscience (both conscience in French), representation and re-presentation…the shifting distinctions between representation within the state and political economy, on the one hand, and within the theory of the Subject, on the other, must not be obliterated.'[87] 'They are related, but running them together, especially in order to say that beyond both is where oppressed subjects speak, act, and know for themselves, leads to an essentialist, utopian politics.'[88]

Spivak's theoretical analysis and its application in the area of TCE registration is set out in Table 1.

indigenous person, and a member of the tribe or the people who files the application. The representative shall be appointed in accordance with the tribe's or the people's social organisations and customs. '

[87] Spivak (n 85) 257.

[88] ibid 259.

	Representation	**Re-presentation**
Definition	(1) To speak for, as in politics.[89] (2) Proxy.[90] (3) Persuasion.[91]	(1) To re-present, as in art or philosophy.[92] (2) Portrait.[93] (3) Tropology.[94]
Context	Representation within the state and political economy.[95]	Representation within the theory of the Subject.[96]
Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*	*vertreten, vertretung*[97]	*darstellen, darstellung*[98]
In the process of registration of TCEs	The legal requirement of representatives in registers.	Re-present TCEs, indigenous peoples' subject and indigenous culture in registers.

[89] ibid 256.

[90] ibid 258.

[91] ibid 259.

[92] ibid 256.

[93] ibid 258.

[94] ibid 259.

[95] ibid 257.

[96] ibid.

[97] ibid 258–259.

[98] ibid.

Table 1: Spivak's analysis of representation, created by the author.

In the process of TCEs registration, the existence of representatives may bring about replacement or appropriation of the local heterogeneous cultures, if 'the event of representation as *Vertretung* behaves like a *Darstellung'*.[99] It has never been a persuasive argument that an oppressed group or class can easily speak for themselves. If we merely rely on an indigenous representative elected by indigenous group and expect that such representative can portrait his or her own group as a whole, it is also 'an essentialist, utopian politics',[100] as Spivak criticises.

With regard to re-presentation (as in art and philosophy) of TCEs in the registration system, this relates to the transformation of TCEs from oral tradition to written or digital forms; Sections 4.3 and 4.4 will discuss the process of representation and transformation of TCEs, and its postcolonial criticism.

3.5.2 Representatives in Colonial Context

With regard to indigenous peoples' representation as in politics, it is argued that the government's framing of 'representativeness' of indigenous peoples is itself colonial.[101] It seems that no legal status of indigenous peoples can be recognised unless they can find a

[99] ibid 260.

[100] ibid 259.

[101] Kathy Bowrey and Jane Anderson, 'The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?' (2009) 18 Social & Legal Studies 479, 491. Also see: Irene Watson, 'Aboriginal Sovereignties: Past, Present and Future (Im)Possibilities' in Suvendrini Perera (ed), *Our Patch: Enacting Australian Sovereignty Post-2001* (Network Books 2007).

representative to speak for their group under the structure of modern law. The Protection Act also follows the logic of representativeness.

As Irene Watson criticises from her experience, the chosen representative is often broken from the original context of indigenous peoples' life, but it seems that the modern state does not know how to communicate with indigenous people if the state cannot find a representative to talk to. She argues that 'a dialogue which is entered into between Aboriginal "representatives" and the state is a communication that is distinct from the idea of "proper" Aboriginal ways of doing business, or talk between independent autonomous peoples.'[102]

In addition, throughout colonial history, representatives being chosen by the coloniser is a very common practice of colonial governance. Take the Dutch colonisation in Taiwan, for example; the Dutch East India Company chose the leader and representative to be the '*oudsfen*' of the indigenous tribes and organised a '*landdag*' (local assembly), even though there had been no leadership system in these tribes. The colonial governor established the sacred symbols to confirm the status of representatives, so as the leadership of these representatives could be enforced in the tribes and could be guaranteed to watch for the coloniser's interests. Tonio Andrade analyses the ceremony of *landdag*:

> The landdag's roots lay in the first stage of VOC (annotation: the Dutch East India Company) expansion in the winter of 1635–36, when dozens of villages sought treaties with the company. It had suddenly gained many and diverse subjects and

[102] Watson (n 101) 31.

> quickly had to find a way to administer them. Missionary Robertus Junius proposed a clever solution, which Dutch officials decided to adopt. They would hold a great ceremony, "in order to give the entry of the villages into Dutch sovereignty a more official status, and to bind these villages, which were usually at war with each other, to the . . . company and also to each other." **The company summoned representatives from each village to the aboriginal village of Sinkan**, the company's closest and oldest ally on the island…**The governor of Formosa… chose two or three of the most powerful representatives from each village to act as leaders** and gave each, as symbols of authority, an orange flag, a robe of black velvet, and a rattan staff with a silver head bearing the company's insignia.[103]

The *landdag* provided an interface between the Dutch and indigenous peoples. Moreover, the colonial power could establish the chain of command by choosing leaders and representatives: 'elders would command towns; governor would command elders; governor-general would command governor; etc. In this way aboriginal towns would be made obedient subjects of "our most esteemed and powerful lords" the Estates General'.[104]

Even if the system whereby representatives were formally appointed by the colonial power to integrate its colonial system of governance has come to an end, in the context of ethnography, the position of 'native informant' is argued to be another form of representatives to produce colonial discourse. Native informants are always legitimised and understood in the context of the colonial space rather than in the aboriginal context. A peoples' voice is manipulated into colonial discourse or is even unheard: 'The collective

[103] Tonio Andrade, *How Taiwan Became Chinese: Dutch, Spanish, and Han Colonization in the Seventeenth Century* (Columbia University Press 2008) paras 11–12 of ch 9 (emphasis added).

[104] Tonio Andrade, 'Political Spectacle and Colonial Rule: The Landdag on Dutch Taiwan, 1629–1648' (1997) 21 Itinerario 57, 83.

or the people's voice speaking into spaces dominated by colonialism is now affected and subjugated by that domination.' [105] Moreover, a criticism has been that with the application of representation system, the colonial authority denies indigenous people's opportunity to re-group, decolonise and re-establish their collective and consensus ways of making decisions.[106]

However, Spivak still emphasises that representation (as in politics) cannot be easily cancelled when the minority has scarce resources under the institutionally disadvantaged condition, and we should be aware that any political representation (*Vertretung*) is also representation of knowledge (*Darstellung*) [107] and carefully handle the design and practice of the representation system. Representation is a double-edged sword. How can we avoid manipulation of the minority's culture? Who can be the representative? Whose representation will be documented? How can the minority culture be represented?[108] These are the questions that indigenous peoples will encounter in the application and registration of their TCEs and which will be explored in our case study.

3.6 Moving on

In this chapter, we discuss five main challenges indigenous peoples may encounter when they claim their rights over TCEs to the modern state. Facing these challenges, indigenous

[105] Watson (n 101) 32.

[106] ibid.

[107] Chun-Mei Chuang, *The Postcolonial Cyborg: A Critical Reading of Donna Haraway and Gayatri Spivak* (Socio Publishing 2016) 158.

[108] ibid 169.

peoples are indeed disadvantaged, and the colonial power generating from the modern state is an ongoing process.

However, indigenous peoples do not play a passive or negative role. In the struggle with the official naming of their people and tribal meeting, in the interaction between indigenous people's customs and the state's law, and in the transformation of the symbols of representatives, indigenous peoples' actions play an important role and are required to be observed and examined. Is it possible for TCEs and the registration system to be a means to challenge the power structure between nation-states and tribes? We will try to further explore these questions in the following chapters. However, before doing so, the third dimension of the shadow of colonialism—colonialism behind the state's registration system—will be explored.

4 Under the Shadow of Colonialism (III): The State's Registration System

Since the *sui generis* regime often provides for registration as a condition of acquiring exclusive rights over registered TCEs, this chapter will explore the registration system under the shadow of colonialism and indigenous peoples' interaction and negotiation with registration. The nature of registries will be examined in Section 4.1. An analysis of the criticism of the coloniser's gaze is given in Section 4.2, followed by an examination of the process of TCE's transformation from oral culture into written forms (Section 4.3) and electronic forms (Section 4.4) through documentation and registration.

4.1 The Nature of Registries

The term 'registry' typically 'has the connotation of a repository or list of information that has an official status'.[1] To be specific,

> It (annotation: a registry) is…a list or database into which people put information in order to gain legal rights relating to that information. "Registering" something in a registry puts it on the record and puts the public on notice that the registrant asserts a claim. For instance, offices of land title include registries in which claims of ownership of land are recorded.[2]

[1] David Downes and Sarah Laird, 'Community Registries of Biodiversity-Related Knowledge: The Role of Intellectual Property in Managing Access and Benefit' (Prepared for UNCTAD Biotrade Initiative 1999) 5.

[2] ibid.

Some argue that registries of TCEs can support the implementation of protecting TCEs and that of sharing benefits with local communities. A famous case of registration of TCEs is Panama's Law No. 20 of June 26, 2000, on Special System for the Collective Intellectual Property Rights of Indigenous Peoples, ('Panama Law 20'), which introduced constitutive registers granting the legal rights of TCEs to indigenous peoples. According to Article 2 of the 2001 Executive Decree of Panama Law 20,

> …(ix) "Collective intellectual property registration" means the exclusive right granted by the State, by virtue of an administrative instrument, to prohibit third parties from the exploitation of collective rights deriving from traditional knowledge or an expression of folklore, the effects and limitations of which shall be determined by the law and this Decree.

Article 4 of Panama Law 20 prescribes the contempt authority of registration,

> …requests for registration of these collective rights shall be made by the respective Congresses or traditional indigenous authorities to the Directorate General of Registration of Industrial Property of the Ministry of Commerce and Industry, hereinafter DIGERPI, or to the National Copyright Directorate of the Ministry of Education, as appropriate, for approval and registration.

Taiwan's Protection Act also adopts Panama's model of constitutive registers of TCEs. The detail of Taiwan's registration of TCEs will be introduced in Part 3.

Registration is a rather old mechanism. Tim Murphy points out the ancientness of "listing" cultural heritage, 'in the emergent cultural property context, a very old and still very important technology is…—the list.'[3] 'Listing is perhaps the simplest as well as earliest device through which old ideas of heritage rooted in and manifested through tombs and monuments, heroes and narratives, is transformed into something more anonymous, dispersed, and in some sense aesthetic.'[4] Listed historical buildings in the UK and UNESCO's World Heritage Site are good examples of the list.[5] Although he focuses on the tangible and material cultural property when describing the list, Murphy also acknowledges that 'the legal technology of recognition is being set to work on a phenomenon no less immaterial than in the domain of intellectual property rights.'[6]

It can be argued that while the registration of intangible property has long existed, registration under the "modern" IP law more generally became a matter of public concern and took the important role of managing and demarcating the limits of intangible property.[7] To be specific, Sherman and Bently contend that the Design Register established by the 1839 Design Art in the UK is the first modern system registration for

[3] Tim Murphy, 'Legal Fabrications and the Case of "Cultural Property"'" in Alain Pottage and Martha Mundy (eds), *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* (Cambridge University Press 2004) 139.

[4] ibid 140.

[5] ibid 139.

[6] ibid 141.

[7] Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge University Press 1999) 4–5.

IP.[8] They emphasise the 'modern' system as a contract of the pre-modern registration system based on three important characteristics.[9]

First, the modern registration system changes the way in which the applicant's proof needs to be manufactured and organised. Pre-modern systems relied on private guild-style modes of regulating and controlling evidential issues, while modern registers involve the process of centralisation.[10]

Second, modern registration also transforms the way in which knowledge is controlled, stored, transmitted and used. The transforming way of re-presentation (in art and philosophy)[11] in registration is also analysed by Sherman and Bently: 'this was the first occasion in which representative registration—the process whereby the creation was represented in pictorial or written terms rather than via a copy or a model – was used.'[12] Gradually, 'the standardization of verbal and visual formulae' and 'the increased reliance on paper inscription' produced a shift from memory-based to print-based methods.[13]

[8] ibid 61.

[9] ibid 70–73.

[10] ibid 70–71.

[11] The two different meanings, representation (as in politics) and re-presentation (as in art and philosophy) have been discussed in Section 3.5.1

[12] Sherman and Bently (n 7) 72.

[13] ibid.

Third, the modern registration system shows up our ignorance of registration: we tend to see registration as an area of 'little conceptual interest, involving only the complex but routine bureaucratic game of paper shuffing'.[14] Sherman and Bently explore the period of reforming the modern registration system that took place in the 1840s: 'the law resorted to more bureaucratic means: to the newly established registration system as a means of organising and regulating the categories.'[15] However, as Latour reminds us, 'paper shuffling is a powerful technology that constantly escapes attention.'[16] In addition, paper shuffling is also a tool the colonial power uses to control, redefine and change the production of local knowledge. Archives, documentation and registration of TCEs relating to the coloniser's gaze are often discussed by postcolonial theorists, as discussed in the next section.

4.2 The Coloniser's Gaze

4.2.1 Documentation and Registration as the Coloniser's Gaze

From the Taiwanese indigenous people's perspective, the building of registration symbolises the beginning of colonialism in their history. As discussed in Section 1.5, the registration system was first introduced in Taiwan by the Dutch colonial power. The Dutch colonial government adopted the registration system to secure private property of

[14] ibid.

[15] ibid 62.

[16] Bruno Latour, 'Drawing Things Together' in Michael E Lynch and Steve Woolgar (eds), *Representation in Scientific Practice* (The MIT Press 1990) 55.

land, which encouraged the migration of Han-Chinese people from China. Gradually Han-Chinese became the majority in Taiwan. Moreover, indigenous peoples lost their traditional territory due to the modern registration system. Most of the time indigenous people did not have the opportunity to claim their traditional territory by registration, so their unregistered lands were classified as national-owned.

In addition, modern registration has become a means and an institution for the government's monitoring, archiving and distributing of information.[17] It is also argued of modern registration systems of IP that 'as systems of registration require applicants to deposit representations of their creations rather than the creations themselves (as had often been the case previously), the task of identifying the owner and the boundaries of the property were resolved bureaucratically.' [18] Jane Anderson argues that the registration mechanism decontextualises information and knowledge and affirms the product 'as a legal object'.[19]

Postcolonial perspectives suggest that registration may produce the coloniser's gaze. Most of these postcolonial views do not directly analyse the government's registration of TCEs, but the registration system of TCEs is one of the state's means of managing and controlling the production of knowledge. Therefore, postcolonial viewpoints, which focus on power relations between the coloniser and the colonised and the production of

[17] Jane E Anderson, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* (Edward Elgar Publishing 2009) 61.

[18] Sherman and Bently (n 7) 5–6.

[19] Anderson (n 17) 62.

colonial discourse, can provide insight into the state's protection of TCEs and indigenous peoples' actions.

Among the postcolonial theorists, Said is most famous for using Michel Foucault's elaboration on discourse, power, and knowledge to describe the coloniser's gaze.[20] The gaze of authority produces knowledge, which produces power.[21] According to Said's postcolonial perspective, the registration system of TCEs is also under the shadow of colonialism.

First of all, the government appoints scholars and tribal elites to examine indigenous people's applications. Through this selective mechanism, only certain types of TCEs can be granted legal rights. The modern state's registers may produce a normalising gaze to monitor what kind of 'tradition' is qualified to be protected. As Foucault points out, 'the examination combines the techniques of an observing hierarchy and those of a normalizing judgement. It is a normalizing gaze, a surveillance that makes it possible to qualify, to classify and to punish.'[22] Indigenous peoples have to respond to the state's gaze in order to gain their rights, so their TCEs are at the risk of being manipulated by the state's examination and registration.

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[20] Edward W Said, *Orientalism* (Penguin 2003) 3.

[21] Jeanne Willette, 'Post-Colonial Theory: Edward Said' (*Art History Unstuffed*, 6 September 2013) <http://www.arthistoryunstuffed.com/post-colonial-theory-edward-said/> accessed 22 April 2015.

[22] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage Books 1995) 184.

Moreover, it can be argued that the coloniser's data collection and archival production is an essential part of colonial governance. Through these measures, the coloniser produces knowledge and enforces the coloniser's gaze. As Said and Mary Louise Pratt have shown, colonial authorities have produced information about the colonised people, including maps, dictionaries, documents and records.[23] Pratt suggests that Europe's planetary consciousness is a basic element constructing modern Eurocentrism: 'This consciousness is a version marked by an orientation toward interior exploration and the construction of global-scale meaning through the descriptive apparatuses of natural history'.[24] In the process of collecting data and establishing the Western model of botanical knowledge, the Western botanist erased the local system of medicinal or ritual classification which had been developed and used by the indigenous people for centuries.[25]

Section 1.5 introduced the Japanese colonial government's data collection project, which may be one of the most thorough statistical surveys ever undertaken.[26] Transforming Taiwan into 'scientific' information and documents is a way by which the coloniser can understand and control. Spivak describes that the British colonial government's archives as fictions, 'the "misreading" of this "fiction" produced the proper name of 'India'.[27] She also discloses mutual construction between the coloniser and the colonised in the making

[23] Sara Mills, *Michel Foucault* (Routledge 2003).

[24] Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation* (Routledge 2007) 15.

[25] Mills (n 23) 71.

[26] George Watson Barclay, *Colonial Development and Population in Taiwan* (Princeton University Press 2015) x.

[27] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press 1999) 203.

and reading of archives: 'The coloniser constructs himself as he constructs the colony. The relationship is intimate, an open secret that cannot be part of official knowledge.'[28]

As Spivak argues that 'the coloniser constructs himself as he constructs the colony', Said suggests that Orientalism reconstructs the Orient as the narcissistic reversal of the West's fictional Self.[29] Like a mirror-image,[30] the image of indigenous people is the reversal of the coloniser. Under the guise of protecting 'tradition', the state can establish its own cultural canon while emphasising that indigenous people are original, traditional, or the 'other'.

The idea of mirror can be found in WIPO's document when WIPO emphasises the importance of TCEs: 'Every nation claiming to be a part of the civilized world is proud of its cultural heritage. Folklore … can reflect the essentials of a nation's cultural attributes as in a mirror and is recognized as a basis for its cultural and social identity'.[31] This sentence implies that TCEs, as in a mirror, are deeply related to the nation itself and gazed by the nation. No matter a nation sees TCEs as the essential of national culture or the reversal of its fictional self, TCEs are always the object gazed by the modern state and can be appropriated as a method for a nation to build its identity and to claim 'to be part of the civilized world'.

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[28] ibid.

[29] Willette (n 21).

[30] Edward W Said, *Orientalism* (Penguin 2003) 209–210.

[31] PV Valsala G Kutty, *National Experiences with The Protection on Expressions of Folklore/ Traditional Cultural Expressions: India, Indonesia and the Philippines* (WIPO 1999).

The postcolonial theorists discussed above may agree that treating TCEs as *sui generis* rights emphasises the Oritentalist distinction between TCEs and 'modern' types of intellectual property. The binary distinction may match Fitzpatrick's reminder that modern law needs images of savagery to confirm its own modernity and TCEs can serve this purpose in the process of modernising and harmonising global IP law, as 'modern myth is the ascent from savagery instead of the descent from gods'.[32] This is the reason for emphasising TCEs as hybridity and focusing on the negotiation in the process of registration in this thesis. Fitzpatrick notes that 'in the uniform light of modernity, there is no room for a duality of meaning or for any ultimate ambiguity',[33] so TCEs as hybridity can upset modernity's concept of 'no room for ambiguity'. The possibility of indigenous peoples' resistant power may exist in their negotiation with modern law and the state, as will be explored in Chapters 5 and 6.

4.2.2 Example: The *Gulou* Village's Maljeveq

Inevitably, the registration system authorises the 'modern' state to review an indigenous people's 'tradition'. The state will deeply embed itself in the legal acknowledgement of TCEs. The following case is an example of the state's gaze through its review and registration of TCEs and their unresolved difficulties.

[32] Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge 1992) 63.

[33] ibid 48.

In Taiwan, people can register their rituals, ceremonies and traditional arts under the Cultural Heritage Preservation Act (CHPA) as 'cultural heritage'. The CHPA was made in 1982. Following the same logic of UNESCO's Convention Concerning the Protection of the World Cultural and Natural Heritage, once a cultural heritage is registered in the government's list of cultural heritage, the government is able to use public resources to safeguard and subsidise the protection of the registered cultural heritage. The CHPA covers tangible and intangible cultural heritage, and an intangible cultural heritage defined by the CHPA[34] is also possibly protected by the Protection Act. Therefore, if TCEs are successfully registered under the CHPA and the Protection Act, they can be protected by both Acts. The overlapping of both Acts in the protection of TCEs is also the reason why this case is worth exploring.

In accordance with the CHPA, the government shall survey by its discretion or examines the applications from any individuals or organisations if a potential cultural heritage is culturally valuable.[35] If the government believes that such heritage should be registered

[34] According to Article 3.2, intangible cultural heritage includes:

(1) Traditional Performing Arts: A traditional art that is created in front of or presented to an audience by the artist to pass down through generations among ethnic groups or geographic regions.

(2) Traditional Craftsmanship: Traditional skills and crafts that are mainly handmade and are passed down through generations among ethnic groups or geographic regions.

(3) Oral Traditions and Expressions: To pass the traditions down through generations via language, recitation or singing.

(4) Folklore: Traditional customs, ceremonies, religious rites, festivals and ceremonies that are related to citizens' life and of special cultural significance.

(5) Traditional Knowledge and Practices: Knowledge, skills and related practices addressed to nature environment that are accumulated or developed by different ethnic or social groups over a long period of time in order to survive in, adapt to, and handle with.

[35] Article 89, Paragraph 1 of CHPA, 'The municipal, county or city competent authorities shall periodically conduct general surveys of, or accept reports from individuals or organizations on,

as cultural heritage or if the government accepts the individual's or organisation's report, it shall register such cultural heritage and provide resources for preservation and maintenance of the registered cultural heritage.[36] In CHPA, the government is the legal subject to preserve the registered cultural heritage, while the Protection Act solely grants indigenous peoples, rather than the government, the authority to decide if their TCEs will be registered and preserved in the state's system.

A recent case involving an indigenous Taiwanese tribe shows the disadvantages of the state's registration system under the CHPA. *Gulou* , a *Paiwan* tribe, is famous for its traditional ceremony called *Maljeveq* (five-year ceremony). As described in Chapter 1, *Maljeveq* is the most important *Paiwan* ceremony to greet their ancestral spirits. According to the tribe's records, *Giring* and *Tjiljuvekan* were two families responsible for co-organising this ceremony. However, in 2012, some members of the *Gulou* tribe who organised the 'Pingdong Educational and Cultural Association' failed to request the consent of the tribal meeting, and registered *Maljeveq* with the state as the cultural heritage of the *Gulou* Village. The register named *Tjiljuvekan* as the sole organiser and preserver of *Maljeveq*. Consequently, in 2014, when the *Giring* family wanted to be involved in the ceremony as usual, the government and the organiser of *Maljeveq* 2014

any items, contents and scopes of intangible cultural heritage deserving of preservation, and shall review, record and trace in accordance with the procedures stipulated by law.'

[36] Article 94 of CHPA, 'The competent authorities shall encourage citizens to record, set up files of, teach about, promote and revitalize intangible cultural heritage.

The competent authorities may grant subsidies for the activities under the preceding paragraph.'

claimed that the *Giring* family's involvement contravened the state's records of cultural heritage.[37]

According to reports, the exclusion of *Giring* changed the fundamental structure of the *Maljeveq* ceremony. For example, the prayer which had been exclusively performed by *Giring*'s priests was once a critical part of the *Maljeveq* ceremony.[38] Ultimately, this element of the ceremony had to be cancelled because the organiser wanted to 'strictly follow the government's records'.[39] Another point of contention in the village pertained to the fact that not all the villagers believed that *Maljeveq* belonged exclusively to the cultural heritage of the *Gulou* people because other *Paiwan* tribes in Taiwan also consider *Maljeveq* as constituting part of their traditions.[40] It was therefore wrong for the government to register one particular family of a specific *Paiwan* tribe as the sole organiser and preserver of *Maljeveq*.

After this dispute, the officers of the competent authority, the anthropologists doing long-term field research on the *Paiwan* culture and the villagers, held several meetings in order to resolve their differences and revise the government's records. However, in the negotiation meeting, a government official who attended showed no intention of either renewing the review process of this case or of amending the government's records.

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[37] Chang De-Chang, 'Dispute in the Golou Village Made an Incomplete Maljeveq (古樓部落 maljeveq 跛腳上場惹人議)' (21 October 2014) <https://www.peopo.org/news/257413> accessed 18 May 2018.

[38] Ibid.

[39] ibid.

[40] ibid.

Instead, he proposed that the *Giring* family register its own version of *Maljeveq* and submit this application for government review.[41] This proposal ignored the cultural context of *Maljeveq* and represented bureaucratic inflexibility. It also confused and frustrated the villagers.

In this case, the registration system was unable to preserve any 'traditions' of the *Gulou* Village; on the contrary, the government's involvement served to destroy local customs. The subjectivity of indigenous people has been erased by the state's law in the name of the 'preservation of their cultural heritage'. Taiwanese anthropologist Kai-Shih Lin also criticises registration of TCEs as 'a rigid, static cultural registration system [that] would turn into a mechanism to suppress any attempt to create new authenticity or what we might call "hybrid authenticity."'.[42] In his opinion, no matter how diverse TCEs may be, the state's registration will erase their distinctive characteristics and alter them to suit the coloniser's imagination.

In the case of *Golou* village, the registration of indigenous peoples' culture may be a more colonial and decontextualising mechanism compared to the registration of design or trademarks according to conventional IP law. As previously discussed, registration had never appeared in Taiwanese indigenous peoples' life until the modern state's legal system entered Taiwan. In addition, from the official naming of indigenous 'peoples' and

[41] The negotiating meeting was held by the Center for Indigenous Studies, National Taiwan University. The video of the negotiation meeting can be found at <https://www.youtube.com/watch?v=x9fsZr6ju8I> accessed 26 May, 2015.

[42] Kai-Shyh Lin, 'Using Intellectual Property Rights to Protect Indigenous Cultures: Critique on the Recent Development in Taiwan' [2007] Journal of Archaeology and Anthropology 185, 203.

'tribes' to the appointments of representatives and experts in the process of the registration of TCEs, every legal rule is relevant to the state's positive involvement, which may manipulate indigenous people's customs and identities. Finally, it is claimed that in the registration, 'the transfer of knowledge from oral into written, printed and electronic forms requires movement across cultures and symbolic translations of ideas,'[43] so that registries are often argued to be unreliable representations of the authenticity of TCEs.

The procedures of registration stipulated by the Protection Act are more flexible than the CHPA, and indigenous peoples play more active roles in the application under the Protection Act. However, to what extent the flexible registration process can improve the danger of the coloniser's gaze will be further explored in Part 3.

4.3 Documentation: Transforming TCEs into Written and Digital Documents

Under the Protection Act, in order to obtain the *sui generis* rights of TCEs, it is necessary to transfer indigenous peoples' culture and knowledge 'from oral into written, printed and electronic forms'. Article 6 of the Protection Act prescribes the process of registration of TCEs: 'The applicant for any intellectual creation shall provide **a written application, a specification, necessary graphics, images and related documents or provide audio-visual evidence** in order to apply for registration with the competent authority' (emphasis added). Article 9 emphasises that 'for intellectual creations, registries shall be established by the competent authority and notices shall be issued to public.' Therefore,

[43] Downes and Laird (n 1) 4.

written and printed forms, including written applications, specifications, graphics and images, are essential documents for registries. If necessary, applicants can provide audio-visual evidence to prove the existence of TCEs, which will be electronic forms transformed from oral tradition. This section discusses two circumstances separately; the process of transforming/translating TCEs into written documents (see Section 4.3.1) and into electronic (or digital) forms (see Section 4.3.2). I will analyse the theoretical discussions on transformation of TCEs by registers use Taiwan's examples to explore the shadow of colonialism these in two circumstances.

4.3.1 Transforming TCEs into Written Form

Transforming TCEs into written form is not an invention created by *sui generis* rights and registration. The coloniser needs native informants to report their knowledge, stories and customs in order to set up colonial archives and to facilitate effective colonial control. Additionally, in ethnography, the native informants can only provide data, and the data are interpreted by 'the knowing subject', [44] such as the anthropologists or colonial officials, and transformed into written documents. Moreover, it is argued that the conventional theme in ethnography always supposes that the other cultures and societies are weak and disappearing, so they need to be saved **in the written text**.[45] Also, a scientific and moral authority is associated with 'redemptive' ethnography, so 'the

[44] Spivak (n 27) 49.

[45] James Clifford, 'On Ethnographic Allegory' in James Clifford and George E Marcus (eds), *Writing Culture: The Poetics and Politics of Ethnography* (University of California Press 1986) 112.

recorder and interpreter of fragile custom is custodian of an essence, unimpeachable witness to an authority.'[46]

James Clifford argues that every documentation that believes itself to be 'bringing a culture into writing' or 'moving from oral-discursive experience (the "natives") to a written version of that experience (the ethnographic text) is enacting the allegory of "salvage".[47] The discourse of ethnography about salvage has enforced Western/non-Western, city/country binary oppositions: it implies that 'primitive, non-literate, underdeveloped, tribal societies are constantly yielding to progress, losing their tradition.' Furthermore, the most problematic aspect is 'its relentless placement of others in a present-becoming past'.[48] Clifford quotes Robert Murphy's comment:[49] 'In name of science, we anthropologists compose requiems.'[50] Bring a culture into the writing system has been so often argued to be under the shadow of colonialism.

For protection of intangible knowledge, the changing of formats is often necessary. As Sherman and Bently suggest, 'one of the primary tasks confronting the law in its dealing with the intangible is the need to be able to identify the property, to trace the protected subject matter as it is translated into new formats.'[51] The subject matter of IP law needs

[46] ibid 113.

[47] ibid.

[48] ibid 114–115.

[49] Robert Murphy, 'Requiem for the Kayapo' (1984) August 12, 1984 New York Times Book Review 34.

[50] ibid.

[51] Sherman and Bently (n 7) 51.

to be capable of 'repetition and reinscription'.[52] Consequently, the representation of intellectual works mainly focuses on the print word in order to enable the task of identification to be presented as being 'quantitative, objective and universal'.[53] In the registration system, acquiring protection through registration requires 'reproducing the intangible subject matter into an object of representation'.[54]

Indeed, registries are media that transform the intangible creation into the printed word. The gap between the print culture and the intangible form is enormous, so the protected intangible creations cannot avoid the process of being limited, represented, and recognised by the modern IP system. However, when it comes to the registration of TCEs, forcing indigenous oral tradition into the system of written culture and official documents is more dubious.

Before the making of the by-laws of the Protection Act, interviews carried out as part of a study conducted in 2012 sought indigenous people's opinions and expectations about the Protection Act. Their concerns are quoted as follows:[55]

[52] ibid. Also see: Murphy (n 3).

[53] Sherman and Bently (n 7) 52.

[54] Anderson (n 17) 68.

[55] The interview was conducted and recorded in Chinese. The following interview quotations have been translated by the author.

'We have to go through the complicated legal process in order to register TCEs…You asked me what was indigenous people's opinions about the process? My answer is only a few words: it is too troublesome.'[56]

'I do not want to register my tribe's TCEs. People laughed at me…but I answered "…I will be satisfied if people appreciate our voice, our culture, and our performance."'[57]

'We acknowledge differences and changes which the Protection Act will produce. It is natural and necessary that we change our concepts of value and our way to record our culture in order to cope with the legal process.'[58]

'I think law is a rigid form. Can law be applied to our changing culture?' [59]

'We are living, so we are creating and updating our culture. The Protection Act is like a freezer. Using a freezer to protect our rights will freeze the development of our culture.'[60]

[56] San-Yuan Lin, 'Empirical Legal Study on the Right of the Traditional Cultural Expressions of Indigenous Peoples (原住民族傳統智慧創作專用權之法學實證研究)' (National Chiao Tung University 2012) 87.

[57] ibid.

[58] ibid. 88.

[59] ibid. 92.

[60] ibid.

These opinions express indigenous people's uncertainty regarding the translation from culture to rights and from their oral culture to written records under the structure of modern law. These comments are similar to Silke von Lewinski's criticism on the fixation of TCEs in the registration system, 'given the fact that folklore is dynamic and transmitted from generation to generation only orally, its fixation would go against the nature of folklore by "freezing" it into a static manifestation.'[61] The colonial institutions, including state laws and registries, are argued to produce the coloniser's gaze and freeze the development of TCEs.[62]

WIPO also cites the example of Nisga'a Tribal Council Office (NTCO) when discussing the suitability of documentation of indigenous peoples' oral stories as a means to create the legal right. Following a Supreme Court decision in the Calder Case (1973) on land claims of the Nisga'a, NTCO began documenting TK, oral traditions and Nisga'a history because they had learned the importance of written evidence for legal disputes. In the subsequent Delgamuukw Decision (1991), the British Columbia Court of Appeal accepted oral histories as evidence of use and occupation when these oral histories had been clearly documented. It was a good beginning that the court was willing to accept the documented oral stories as evidence. However, after the court emphasised that documentation was a condition supporting the credibility of oral stories, the NTCO began to merely focus on

[61] Silke von Lewinski, 'An Analysis of WIPO's Latest Proposal and the Model Law 2002 of the Pacific Community for the Protection of Traditional Cultural Expressions' in Christoph Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International 2009) 121.

[62] Discussions of the coloniser's gaze are in Section 4.2.

'entitlement stories', which had a close relation to land and resource use under customary law and practice.[63]

These examples demonstrate that it is possible that registration of TCEs may produce self-regulatory creators who 'conform to the conditions of registration in order to secure protection'.[64] However, it is also the idea of Orientalism if we suggest that the written institution is colonial and should be prevented or abandoned. The naïve prevention from intangible culture into written documents may also function as a 'freezer' that causes hybrid TCEs to be paralysed.

Looking back to the history of IP law, in the eighteenth and nineteenth centuries the intangible was thought of not as a thing but a form of action or performance.[65] Modern IP law focusing on the object rather than the action may be a symbol of the law's limits, as Sherman and Bently argue,

> The law was unable to represent the intangible in a way which reflected its active or dynamic nature. One reason for this was the law lacked the language with which to reproduce the performative nature of the intangible… As a consequence of being forced to represent these dynamic concepts in static terms, the performative aspect of the intangible took on a somewhat ambivalent status within the law.[66]

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[63] WIPO, 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)' (2001) 121.

[64] Anderson (n 17) 62.

[65] Sherman and Bently (n 7) 47.

[66] ibid 49–50.

The law lacked the language to describe hybrid TCEs, but new languages of law can be created. It is also necessary to avoid suggesting a simple opposition between action and thing. There is 'an intermediate zone' in which the law can operate between action and thing and 'deal in elements which were neither actions nor things'.[67] The hybrid and transforming TCEs are the subject which the legal research may develop their language to describe and analyse.

4.3.2 Transforming TCEs into Digital Form

Downes and Laird describe the process of registering TK and address the difference between 'the final electronic form' and 'the original oral form':

> Each "expert" along the way, and their associated "community of belief," will leave a mark on the "knowledge" thereby documented. The medium in which an item, complex or system of knowledge is embedded, expressed or recorded, arguably shapes and changes the nature of the knowledge itself and the way in which human beings interact with it. As a result, the extent to which the final electronic form and the original oral form of the knowledge relate to each other can be questioned, which in turn raises questions about the value of databases and registries as a tool for the conservation of culture and knowledge. [68]

The criticism made by Downes and Laird quoted above describes a registry as 'the medium in which an item, complex or system of knowledge is embedded, expressed or

[67] ibid 50.

[68] Downes and Laird (n 1) 4.

recorded, arguably shapes and changes the nature of the knowledge itself and the way in which human beings interact with it.' Jane Anderson also points out that 'indigenous knowledge will never be "securely" or fully captured in registries.'[69] According to their concern, the state's registry uses modern written or electric form to record intangible TCEs. The process of recording and decoding might be a process of colonialism, which will make 'the original' far from the authenticity and capture indigenous people's living culture into the coloniser's inflexible records. The idea of tradition being destroyed by reproduction is similar to Benjamin's argument about the work of art in the age of mechanical reproduction. This idea will be explored below.

However, the nature of knowledge itself will be changed in all kinds of registries. It may not be the sole challenge that indigenous people will face in the process of registering their TCEs. Benjamin's introduction of mass production will be introduced first to see the classical criticism of reproduction of art. The following are three differing arguments and experiences that provide diverse messages regarding the nature of registries and reproduction. These three brief comparisons will be the discussion transferring the focus in the second part of this thesis from the analysis of the shadow of colonialism to indigenous peoples' diverse negotiation and response to the colonial institution.

(1) Walter Benjamin's 'The Work of Art in the Age of Mechanical Reproduction'

The most famous essay about reproduction and authenticity in culture and art is Benjamin's 1936 article *The Work of Art in the Age of Mechanical Reproduction.* He argues

[69] Anderson (n 17) 9.

that 'the presence of the original is the prerequisite to the concept of authenticity.'[70] Moreover, no matter how perfect reproduction of a work of art is, it lacks 'its presence in time and space, its unique existence at the place where it happens to be.' [71] By mechanical reproduction, the ***aura*** of the work of art withers.[72]

Benjamin defines ***aura*** as 'a unique phenomenon of a distance however close it may be'.[73] He uses the definition to emphasise cult value of the work of art in terms of space and time. Benjamin supposes cult value is an essential part of the original work of art. The cult value should be unapproachable and distant, so we may get close to the copy of a work of art in the age of mechanical reproduction, but the cult value of art disappears.[74]

Finally, Benjamin also argues that 'the technique of reproduction detaches the reproduced object from the domain of tradition. By making many reproductions it substitutes a plurality of copies for a unique existence.'[75] It is argued that mechanical reproduction destroys the tradition of the cultural heritage.[76]

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[70] Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' in Harry Zohn (tr), *Illuminations* (Schocken Books 2007) 220.

[71] ibid.

[72] ibid 221.

[73] ibid 243, note 5.

[74] ibid, note 5.

[75] ibid 221.

[76] ibid.

According to Benjamin's argument, mechanical reproduction of a TCE as a representation will lose such TCE's cult value and aura and detach it from the domain of tradition. However, from observing different cultures, it can be observed that Benjamin's idea cannot be applied universally.

(2) Pinney's 'The Indian Work of Art in the Age of Mechanical Reproduction'

It is accurate to say that 'the copy' is not the original. However, is mass reproduction of 'the copy' really so destructive towards the traditional and cult value of cultural heritage? It is argued that Benjamin's attitudes towards Western culture cannot apply to the cultural practices in different areas. For example, the anthropologists researched India's popular culture and came to a complicated conclusion that challenges Benjamin's argument. Michael Taussig found that the work of mechanical reproduction—the Indian-made films—created the cinema as a zone of sensory mutuality.[77] Moreover, Christopher Pinney's *The Indian Work of Art in the Age of Mechanical Reproduction* argues that this zone of mutuality is equally apparent in Indian popular chromolithograpgy.[78] Mass reproduction of Indian gods' images gives the formerly excluded class access to all the high gods without the intercession of priests.[79]

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[77] Michael T Taussig, *Mimesis and Alterity: A Particular History of the Senses* (Psychology Press 1993) 24.

[78] Christopher Pinney, 'The Indian Work of Art in the Age of Mechanical Reproduction: Or, What Happens When Peasants "Get Hold" of Images' in Faye D Ginsburg, Lila Abu-Lughod and Brian Larkin (eds), *Media worlds: anthropology on new terrain* (University of California Press 2002) 355.

[79] ibid 363.

According to Pinney's observation, initially the pictures of gods are just 'paper'. However, through 'seating'[80] it, the 'alienable commodity becomes an inalienable embodiment of the divine'.[81] In addition, the pictures cannot be thrown casually. A villager said: 'No, no, no. It's become just like a small temple [*madhi*]. We put them in water; we break a coconut and give them *paraba* (ritual cooling) in the water. If you throw them in the street they will come under someone's feet.'[82]

By exploring the Indian peasants' attitudes towards films and pictures of gods, Pinney claims that the Indian work provincialises Western knowledge that supports the binary distinction of the original and the copy.[83] However, how does the reproduction of TCEs work in registration? *Seediq*, a Taiwanese indigenous people, provided another dimension and experience.

(3) Taiwanese Indigenous People's Work of Art in the Age of Mechanical Reproduction

[80] 'Seating' is the process of sanctifying the image. The process of seating can be found in Pinney's interview with a villager. He has interviewed 117 households in the village and Lila's testimony is consistent with all but one of the others. (ibid.)

[Pinney:] When the picture is [for sale in the market] is there any *shakti* [energy] in the picture?]

[Lila:] It's just paper. That's all? Yes, paper. It's just paper, it hasn't been"seated" [*baithana*]. You see those pictures that are "seated"? [Lila pointed to the images on the wall.] Those are paper, but by placing them before our eyes [*ankh rakhna* = to love, to entertain friendship, to admire], *shakti* [energy] has come into them. . . . We take [the pictures] inside and do *puja*. We place *agarbatti* [incense sticks] against his name, against the god's name. Yes, it's a paper photo but we recite, we recite while the *agarbatti* burns. OK, so it's a paper photo but [that makes no difference]. We entreat the god and the god comes out because the god is saluted. That's how it is.

[81] ibid.

[82] ibid 367.

[83] ibid 356. The idea of provincialisation of Europe, see: Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2000).

In the state's registration system, reproduction and representation can be used more constructively. In Taiwan, an examination of the application of the *Seediq*[84] in the registration system is useful in exploring the advantages and disadvantages of reproduction by new technology in the interaction between the state and indigenous people.

In 2015, the *Seediq* faced problems when they applied to register their TCEs. They planned to register four folksongs in order to obtain their *sui generis* rights. One of the reviewers in the preliminary review, a professor teaching Western classical music, made the criticism that the folksongs had not been correctly documented by the staff notation. Hence the *Seediq* revised the records and continued to the second round of reviews. Surprisingly, another reviewer in the second round of reviews made the criticism that the records were 'too detailed', which might be an obstacle for the tribe to prove the outsider's infringement of TCEs in the future. The final conclusion was that the reviewers rejected the application of the *Seediq*.

[84] The Seediq (賽德克族) are a Taiwanese indigenous people who live primarily in Nantou County and Hualien County. Their language is also known as Seediq. They were officially recognised as Taiwan's 14th indigenous group on 23 April 2008. Seediq people were made up of three groups: the Tgdaya (德克塔雅群; 德克達雅群; 德固達雅群), Toda (都達群; 道澤群), and Truku (德路固群). See: 'Seediq Tribe_General Distribution' (*Taiwan Indigenous Culture Park*) <http://www.tacp.gov.tw/tacpeng/home02_3.aspx?ID=$3136&IDK=2&EXEC=L> accessed 30 March 2016. For more discussions regarding their history, see: Darryl Sterk, 'Subjective, Objective and Indigenous History: Seediq Bale's Take on the Wushe Incident' (*Savage Minds: Notes and Queries in Anthropology*, 4 January 2012) <http://savageminds.org/2012/01/04/seediq-bale-as-history/>.

In fact, using the staff notation to record indigenous people's folksongs is questionable, because their tunes and notes are not consistent with the twelve-tone equal temperament of Western classical music. The reviewers' attitudes are also questionable. When indigenous people plan to register the folksong belonging to them, the reviewers should respect the indigenous people's ability and authority of self-description to the greatest extent possible. The writing style of their claims should be a minor question and should not be the essential concern when reviewers consider the approval of this application. 'After all, no one can express our TCEs better than ourselves', concluded by *Iwan Perin,* the organiser of this *Seediq* case.

After the failure of their application, the *Seediq* decided to revise their application by adding two extra folksongs into their original claim. In the revised application, they added audio and video files of the folksongs, which were recorded in their traditional ceremonies, to reproduce and represent their folksongs. Since the written form of folksongs could not pass the reviewers' examination, the *Seediq* tried the electronic form as a more effective means to record the details of their TCEs and to create their legal rights.[85] Finally, Seediq's application of six folksongs was approved on August 10, 2018.[86]

[85] This is Iwan Perlin's story. It was discussed in a lecture in a public training course and noted by the author on February 1, 2016.

[86] Six cases of registration are all attached by audio and video files and publicly announced via the official website of the Council of Indigenous Peoples: The Seediq People, 'Ekaibe (一起來跳舞)' <https://www.titic.apc.gov.tw/ir2015db/ekaibe-%E4%B8%80%E8%B5%B7%E4%BE%86%E8%B7%B3%E8%88%9E> accessed 11 August 2018; The Seediq People, 'Siyo Siyo Sii / Siyo Siyo Siey / Siyo Siyo Sii (你能，我能，你看)' <https://www.titic.apc.gov.tw/ir2015db/siyo-siyo-sii-siyo-siyo-siey-siyo-siyo-sii-%E4%BD%A0%E8%83%BD%EF%BC%8C%E6%88%91%E8%83%BD%EF%BC%8C%E4%BD%A0%E7%9C%8B> accessed 11 August 2018; The Seediq People, 'Ohnay (誰是我喜歡的人)' <https://www.titic.apc.gov.tw/ir2015db/ohnay-%E8%AA%B0%E6%98%AF%E6%88%91%E5%96%9C%E6%AD%A1%E7%9A%84%E4%BA%BA> accessed 11 August 2018; The Seediq

The *Seediq*'s case shows that it is possible that the production of the electronic form, including audio and video recordings, can free indigenous peoples from the colonial binary distinction between oral and written culture in the process of registration. Audio and video recordings become an opportunity to challenge the reviewer's obsession about the written form and to decrease the conflicts between the oral culture and the print world.

The stories about using the method of digitalising indigenous peoples' folksongs and ceremonies to enter the system of the state's registries will be explored in the next part. The electronic and digital forms of TCEs may not contain the *aura* Benjamin adored, but this does not matter to indigenous peoples' registration. It is natural that the state cannot catch the *aura* of indigenous people, whether now or in the future. As McLuhan holds a positive attitude towards 'the meeting of two media',[87] the meeting of oral culture and electronic forms may help indigenous people to reverse their status in the process of

People, 'Oyos Na Oyos (分享獵物歌)' <https://www.titic.apc.gov.tw/ir2015db/oyos-na-oyos-%E5%88%86%E4%BA%AB%E7%8D%B5%E7%89%A9%E6%AD%8C> accessed 11 August 2018; The Seediq People, 'Yonodoni Ta Da/Ndutudi Ta Da/Endtuji Ta Da (我們一起來跳舞)' <https://www.titic.apc.gov.tw/ir2015db/yonodoni-ta-dandutudi-ta-daendtuji-ta-da-%E6%88%91%E5%80%91%E4%B8%80%E8%B5%B7%E4%BE%86%E8%B7%B3%E8%88%9E> accessed 11 August 2018; The Seediq People, 'O Bale／o Balay／o Balay(呼喊的還工歌)' <https://www.titic.apc.gov.tw/ir2015db/o-bale%EF%BC%8Fo-balay%EF%BC%8Fo-balay-%E5%91%BC%E5%96%8A%E7%9A%84%E9%82%84%E5%B7%A5%E6%AD%8C> accessed 11 August 2018.

[87] 'The hybrid or the meeting of two media is a moment of truth and revelation from which new form is born. For the parallel between two media holds us on the frontiers between forms that snap us out of the Narcissus-narcosis. The moment of the meeting of media is a moment of freedom and release from the ordinary trance and numbness imposed by them on our senses.' See*:* Marshall McLuhan, *Understanding Media: The Extensions of Man* (The MIT Press 1994) 55.

interacting with the modern state. I will review more evidence from Taiwan to examine the positive attitude towards multi-media in the process of registration.

Bhabha's postcolonial perspective is revisited here. In his discussion about minority culture and authenticity, Bhabha refers to Walter Benjamin's 'the irresolution of translation' and suggests that the element of minority culture's resistance is 'that element in a translation which does not lend itself to translation'. [88] Therefore, the untranslatability of indigenous peoples' culture in the process of documentation and registration can become the element of indigenous peoples' resistance. For Bhabha, it is the minority culture's untranslatability that 'moves the question of culture's appropriation beyond the assimilationist's dream'.[89]

In such an ambivalent process of registration, the government and people will encounter the hybridity of cultures and cultural differences. WIPO has also recognised the untranslatability of TK and TCEs in the legal system:

> Legal mechanisms for TK protection are distinct from the TK as such, and may never capture the full holistic nature of the TK—given that their function is essentially to restrain third parties from undertaking unauthorized acts in relation to the subject matter, rather than to express the TK fully and comprehensively.[90]

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[88] Walter Benjamin, 'The Task of the Translator: An Introduction to the Translation of Baudelaire's Tableaux Parisiens Category' in Hannah Arendt (ed), *Illuminations* (Schocken Books 2007); Homi K Bhabha, *The Location of Culture* (Routledge 1994) 224.

[89] Bhabha (n 88) 224.

[90] WIPO, 'Elements of a Sui Generis System for the Protection of Traditional Knowledge WIPO/GRTKF/IC/4/8' (2002) 2.

This responds to Benjamin's *aura* idea: even though aura cannot be preserved in the process of reproduction and documentation, the lost aura, symbolising the element which cannot be translated, becomes the element of minority culture's resistance.[91]

4.4 Moving on

The register itself may neither automatically become a means of the effective protection[92], nor become a means that essentially performs the colonial ideologies. Stuart Hall argues that 'the differences between colonising and colonised cultures remain profound. But they have never operated in a purely binary way and they certainly do so no longer.'[93] The Western colonial discourse keeps creating the binary distinction between the coloniser and the colonised, between tradition and modern but, in practice, these distinctions have never operated in a pure way. Even if we adopt registration without further considering its colonial history, or we reject registration in order to separate 'traditional' culture from

[91] Benjamin also says that reproducible art may not support the function of ritual, but it begins to support another function, politics: '…the instant the criterion of authenticity ceases to be applicable to artistic production; the total function of art is reversed. Instead of being based on ritual, it begins to be based on another practice: politics.' See: Benjamin (n 70) 224. Benjamin holds a negative attitude towards art in electronic form that supports politics, because he believes camera and recording equipment have changed the way of democratic election, and the winner will always be the star and the dictator; see: ibid 247. But in our contemporary world, the definition of politics is broadened. The reproduction of TCEs, which does not support ritual function, can support minority's political resistance and identity politics.

[92] For example, United Nations Universities-Institute of Advanced Studies conducted a comparative analysis of databases and register systems and concludes, 'Databases and registers alone do not provide a means for the effective protection of TK. Rather, they must be seen as one element or mechanism in a wider system of TK governance including customary law and practice, national access and benefit–sharing legislation, and sui generis TK law and policy.' See: UNU-INS Report, 'The Role of Registers & Databases in the Protection of Traditional Knowledge: A Comparative Analysis' (UNU-INS 2004) 38 <http://www.iapad.org/wp-content/uploads/2015/07/Protection-of-TK.pdf>.

[93] Stuart Hall, 'When Was "The Post-Colonial"? Thinking at the Limit' in Iain Chambers and Lidia Curti (eds), *The Post-colonial Question: Common Skies, Divided Horizons* (Psychology Press 1996) 247.

'modern' institutions, both options are under the shadow of colonialism. Therefore, the next part will begin the third part of this thesis: to analyse the question from Taiwanese indigenous peoples' experience. It will explore how the Protection Act recognises and responds to the shadow of colonialism. It also analyses the existing applications submitted by Taiwanese indigenous peoples according to the Protection Act and sees how indigenous peoples negotiate their TK and culture with the state.

Part 3: Response to the Shadow of Colonialism

Part 3 will introduce the details of the Protection Act, including its *ratio legis*, content, and enforcement. The framework of this part does not introduce the Protection Act from A to Z, but analyses how the existence of the Protection Act can respond to, or fail to respond to, the three dimensions of the shadow of colonialism described in Chapters 2, 3 and 4. In addition, the enforcement of the Protection Act cannot only be analysed with respect to the law itself, but has to include Taiwan's indigenous peoples' perspectives and actions relevant to the Protection Act. These are also introduced in this part to see their interaction and negotiation with the state's law.

In what follows, Chapter 5 explores the Constitutional promise and domestic and international sources of law supporting the Protection Act. Responding to the shadow of colonial IP law, the Protection Act tries to reconstruct the meaning of *sui generis* rights by observing relevant laws and indigenous peoples' actions. Chapter 6 observes *Pakedava's* process of registering TCEs and examines their resistance against the colonial shadow of the modern state's control. Chapter 7 responds to the shadow of colonialism in registration by analysing Taiwanese indigenous peoples' negotiation with the state in the applications of registering their TCEs.

5 Responding to the Shadow of Colonial IP

This Chapter explores how the Protection Act responds to the shadow of colonial IP by observing domestic and international sources of law supporting the Act and indigenous peoples' actions. The following sections explore how the Protection Act reconstructs the meaning of *sui generis* rights (see Section 5.1), challenges colonial naming and categories (see Section 5.2), recognises group rights (see Section 5.3) and builds up the mooting programme to communicate with indigenous peoples (see Section 5.4).

5.1 Reconstructing the Meaning of *Sui Generis* Rights

It is largely agreed that an appropriate way to achieve protection of TCEs is through *sui generis* protection, which is able to account for their unique legal ideas and treatment. Conventional IP law is not completely irrelevant to the protection of TCEs, as some TCEs are the combination of the elements separately protected by patents, copyrights or neighbouring rights.[1] However, a *sui generis* system will not require the holders of TCEs to cut their culture into pieces in order to get the protection of IP. A TCE can be registered and protected as a whole. Of course, it can also be registered by parts, if the applicants of registration prefer to do so.

[1] For example, WIPO analyses an Amazon shaman's connection to conventional IP: the curing plants the shaman uses may be protected under a plant variety system, the formula extracted from the curing plants can be protected by the patent law, the shaman's prayer can enjoy copyright protection, and the performance of the whole ritual can be protected by copyright-related rights, if the performances were fixed. See: WIPO, 'Elements of a Sui Generis System for the Protection of Traditional Knowledge WIPO/GRTKF/IC/4/8' (2002) 15–16.

At the international level, the WTO Secretariat also comments on the *sui generis* protection, under Article 27.3 (b) of the TRIPS agreement; '*sui generis* protection gives Members more flexibility to adapt to particular circumstances arising from the technical characteristics of inventions in the field of plant varieties, such as novelty and disclosure.'[2] Compared to the gradual harmonisation of conventional IP regime, *sui generis* systems are in the process of development and negotiation, and they can be established by member states' diverse demands.

However, as we discussed in Chapter 2, Coombe suggests that TK and TCEs as *sui generis* rights are constructed by Orientalist concepts.[3] Rahmatian also argues that a neo-colonial device is practised in the discourse of TCEs as *sui generis* rights because *sui generis* is an attempt to 'turn back the clock'.[4] It is also criticised to be Orientalism in that the legal term 'TCEs' selectively categorises some kinds of traditional art which fit Western imagination, especially music, dance and oral literature.[5]

As a legal system that constructs TCEs as *sui generis* rights, can the Protection Act be exempted from the shadow of Orientalism? In Taiwan's context, I begin with exploring

[2] WTO Secretariat, 'The Convention on Biological Diversity and the Agreement on Trade-Related Aspects of Intellectual Property Rights, Note by the Secretariat IP/C/W/216' (2000) para 33; WIPO (n 1) 14.

[3] Rosemary J Coombe, 'The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy' (1993) 6 Canadian Journal of Law & Jurisprudence 249, 250.

[4] Andreas Rahmatian, 'Neo-Colonial Aspects of Global Intellectual Property Protection' (2009) 12 Journal of World Intellectual Property 40, 60.

[5] ibid.

the root of the Protection Act, and suggest that ***sui generis* rights as indigenous peoples' parallel sovereignty** may decrease the danger of Orientalism. Moreover, the emphasis of indigenous people's sovereignty, which leads to the necessity of their participation in the international IP forum, can also challenge the shadow of colonialism in international IP law.

5.1.1 *Sui Generis* Rights as Indigenous Peoples' Parallel Sovereignty

It is usually argued that the UN Declaration on the Rights of Indigenous Peoples, the former President's semi-treaty with indigenous peoples (the New Partnership agreement), Article 10 of the Additional Articles of the Constitution, and the Indigenous Peoples Basic Law construct the fundamental legal rights of Taiwan's indigenous peoples.[6] These legal sources support not only *sui generis* rights in the Protection Act, but also the state's recognition of indigenous peoples' sovereignty. The following is the introduction of these legal sources and their implications of indigenous peoples' parallel sovereignty.

(1) The Additional Articles of the Constitution (中華民國憲法增修條文)

Responding to the awakening of indigenous peoples' movements in the 1980s,[7] Taiwan's Additional Articles of the Constitution was amended in 1994 to rectify

[6] Chih-Wei Tsai, 'From Object to Subject: The Development of Taiwan Indigenous Peoples' Laws and Rights' (2011) 40 National Taiwan University Law Journal 1499, 1514.

[7] Many researchers agree that the first indigenous magazine *Gau Shan Ching* (高山青) issued in 1983 is the starting point of indigenous movements in Taiwan. In 1984, the first group of

indigenous names from 'mountain people'(山胞) to 'indigenous people'(原住民). In 1997, the term 'indigenous people' was substituted by 'indigenous peoples'(原住民族).[8] Simultaneously, the Additional Articles of the Constitution confirmed the protection of indigenous people's culture and lands, and Taiwan as a multicultural country.

The protection of indigenous rights and the confirmation of Taiwan as a multicultural country were prescribed in Article 10 of the Constitution:

> Article 10, Paragraph 10: 'The State affirms **Multiculturalism** and shall actively preserve and foster the development of aboriginal languages and cultures.'
>
> Article 10, Paragraph 11: 'The State shall, in accordance with the will of the ethnic groups, safeguard the status and political participation of the aborigines. The State shall also guarantee and provide assistance and encouragement for aboriginal education, **culture**, transportation, water conservation, health and medical care,

indigenous activists, the Alliance of Taiwan Aborigines (台灣原住民族權利促進會) was born. It issued the famous 'Declaration of the Rights of Taiwan's Indigenous Peoples.' The movement of indigenous people from 1984 focused on the rectification of indigenous names and land rights. See: Chun-Chieh Chi, 'Indigenous Movements and Multicultural Taiwan' in Gunter Schubert (ed), *Routledge Handbook of Contemporary Taiwan* (Routledge 2016) 269–270; Icyang Parod (ed), *Documentary Collection on the Indigenous Movement in Taiwan (臺灣原住民族運動史料彙編)* (Academia Historica and the Council of Indigenous Peoples 2008).

[8] The Center for Aboriginal Studies, National Chengchi University, 'The Collection of Government Documents Regarding the Name Rectification Movement of Taiwan Indigenous Peoples (臺灣原住民族正名運動政府體制文獻史料彙編)' (The Council of Indigenous Peoples 2016) 1–2 <https://www.apc.gov.tw/portal/getfile?source=2D838540F5D6F659FAFB9859EF31AC3B381A272F479D65D98D902DFAAFC2E1545FDBF723B1AD10507DAF23C9F02B90BD938D445D9DD999C23B91B9DF71659F0C&filename=A040E0874D83D97253350DA7102552C3324CB681587EB89B26839EC7F3390E9E7404002558E876EBEF40C442D037076210E4AC0D544D48CD>.

economic activity, land, and social welfare, measures for which shall be established by law…'. [9]

(2) New Partnership (新夥伴關係) signed by the President and the representatives of indigenous peoples

Although Taiwan's Constitution confirmed multiculturalism within the country, multicultural perspective can only support the view that indigenous people are one of the diverse cultural and ethnic groups under the modern state's structure. However, on 10 September 1999, indigenous peoples' legal status was developed to a higher level. The Democratic Progressive Party's Presidential candidate Chen Shui-bian, who later won the 2000 Presidential election, signed a treaty-like document, *A New Partnership between the Indigenous Peoples and the Government of Taiwan* (the 'New Partnership', 原住民族和台灣政府新的夥伴關係) in Taiwan's Orchid Island, along with the representatives of the indigenous peoples. Twelve indigenous representatives, who represented eleven indigenous peoples, drafted and proposed seven articles to President Candidate Chen Shui-bien for agreement. This document was, therefore, created by indigenous peoples' action on their own initiative. By this agreement, indigenous peoples claimed their parallel sovereignty to the modern state. The seven articles of the New Partnerships promised by the President are as follows:

1. Recognising the inherent sovereignty of Taiwan's indigenous peoples.
2. Promoting autonomy for indigenous peoples.
3. Concluding a land treaty with Taiwan's indigenous peoples.
4. Reinstating traditional names of indigenous communities and natural landmarks.

[9] 'Constitution of the Republic of China (Taiwan), Additional Articles' (*Office of the President Republic of China (Taiwan)*) <https://english.president.gov.tw/Page/95> accessed 23 July 2018. (Emphasis added).

5. Recovering traditional territories of indigenous communities and peoples.
6. Recovering use of traditional natural resources and furthering the development of self-determination.
7. Providing legislative (parliamentary) representation for each indigenous people.[10]

As the New Partnership had been signed before Chen Shui-bien officially became the President, to solve the debate of the legal effect of the New Partnership, in 2002 then-President Chen Shui-bian held a ceremony to reconfirm the legal effect of the 'New Partnership'.[11] After the ceremony, the New Partnership became the official indigenous policy for the government. In the New Partnership, the President representing the modern state recognises the inherent sovereignty of Taiwan's indigenous people and promises to sign a land treaty with indigenous people. Using the wording 'sovereignty' and 'treaty' means that a parallel and equal relationship was established between the modern state and indigenous peoples. Evidence supporting the argument of indigenous people's parallel sovereignty can also be found in the then President Chen's public speech. As he explicitly stated to the public, the New Partnership represents the relationship between the state and indigenous peoples as 'a state within a state'(國中有國), or the 'quasi nation-to-nation relationship'(準國與國關係).[12] Accordingly, the modern state's

[10] The official text is in Chinese: 1.承認台灣原住民族之自然主權；2.推動原住民族自治；3.與台灣原住民族締結土地條約；4.恢復原住民族部落及山川傳統名稱；5.恢復部落及民族傳統領域土地；6.恢復傳統自然資源之使用、促進民族自主發展；7. 原住民族國會議員回歸民族代表。

[11] Office of the President, Taiwan, 'President Participated in the Ceremony of Reconfirmation of 'A New Partnership Between the Indigenous Peoples and the Government of Taiwan'(總統參加原住民族與台灣政府新夥伴關係再肯認儀式)' (19 October 2002) <http://www.president.gov.tw/Default.aspx?tabid=131&itemid=1011> accessed 8 August 2018.

[12] The Government Information Office, Executive Yuan, The Collection of President Chen Shui-bien's speech, 2016, Volume 1 (陳總統水扁先生九十五年言論選集(上)) (The Government Information Office, Executive Yuan 2007) 104. The Office of the President Taiwan also published this speech on the official website, see: Office of the President, Taiwan, 'The President's Speech in the 2006 Symposium "A State within a state: The Chapter for the Aborigines in Taiwan's

policy and law should be enacted and interpreted based on the principle of the quasi nation-to-nation relationship. *Sui generis* rights are no exception and shall be understood as the rights to guarantee indigenous peoples' parallel sovereignty.

(3) Indigenous Peoples Basic Law

Of course, in order to implement the New Partnership, more legal efforts were needed. Moreover, according to Article 10 of the Additional Articles amended in 1997, 'The State shall also guarantee and provide assistance and encouragement for aboriginal education, culture, transportation, water conservation, health and medical care, economic activity, land, and social welfare, measures for which shall be established by law'. It is requested by the Constitution that indigenous people's rights shall be further fulfilled by laws. Accordingly, the Indigenous Peoples Basic Law was enforced in 2005. The Indigenous Peoples Basic Law is therefore considered as a quasi-constitutional law, and some arguments even see the Indigenous Peoples Basic Law as 'a semi-treaty based constitutional rewrite.'[13]

In the Indigenous Peoples Basic Law, several articles show the confirmation of multiculturalism, such as 'the government shall keep and maintain indigenous cultures' (Article 10), 'in accordance with the will of indigenous peoples' (Article 11), 'the

Constitution" (總統出席 2006 年「國中有國：憲法原住民族專章」學術研討會開幕典禮)' (18 November 2006) <https://www.president.gov.tw/NEWS/10861> accessed 15 March 2018.

[13] Chu-Cheng Huang, 'Legalizing Community Resources — Experiences Learned from Implementing the Indigenous Traditional Intellectual Creations Protection Act (ITICPA)' (2014) 1 The IAFOR Journal of Politics, Economics and Law 29, 30; Also see: Chu-Cheng Huang, 'Interpreting the Rights of Indigenous Peoples under the Constitutional Scheme' (2009) 6 Constitutional Interpretation: Theory and Practice 429.

government shall respect indigenous peoples' rights to choose their life style, customs, clothing, modes of social and economic institutions, methods of resource utilization and types of land ownership and management' (Article 23) and 'formulate public health and medical policies for indigenous peoples 'in accordance with the characteristics of indigenous peoples' (Article 24).[14]

As discussed in Chapter 2, *sui generis* rights are often argued as a mechanism of making 'the other'. However, in Taiwan, some researchers tried to put forward the theory that *sui generis* rights can support an equal and parallel status to the modern state.[15] Tsai Chih-Wei argues that the idea of *sui generis* rights is presented in the *ratio legis* of Article 20 of the Indigenous Peoples' Basic Law: '**Indigenous peoples exist before the state.** Therefore, the states in the international society respect indigenous peoples' right to control their traditional territories and recognise their rights of lands and natural resources.'[16] For Tsai, the *sui generis* rights also symbolise the state's recognition of the fact that indigenous peoples exist before the state. In addition, Huang argues that *sui generis* rights have been supported by multiculturalism in Taiwan's Constitution.[17] The content of *sui generis* rights should be interpreted by the quasi 'nation-to-nation'

[14] Huang, 'Interpreting the Rights of Indigenous Peoples under the Constitutional Scheme' (n 13) 432.

[15] See: Chu-Cheng Huang, 'Indigenous Intellectual Creations and Sui Generis: A Critical Interpretation of the New Protection Act for the Traditional Intellectual Creations of Indigenous Peoples (傳統智慧創作與特殊權利──評析「原住民族傳統智慧創作保護條例」)' (2010) 3 Taiwan Journal of Indigenous Studies 11; Tsai (n 6).

[16] Tsai (n 6) 1536. (Emphasis added).

[17] Huang, 'Indigenous Intellectual Creations and Sui Generis: A Critical Interpretation of the New Protection Act for the Traditional Intellectual Creations of Indigenous Peoples (傳統智慧創作與特殊權利──評析「原住民族傳統智慧創作保護條例」)' (n 15) 18–24.

relationship between indigenous peoples and the state. Huang further suggests that the *sui generis* right is the original title, which shall not require any legitimacy from civil laws and the Constitution.[18]

Huang uses the 1993 Apology Resolution passed by the US Congress[19] as a classical example to explain the modern state's possibility of the reconstruction of special relation with indigenous people. Huang suggests that by means of the 1993 Apology Resolution, the US went beyond ethnocentralism in the US Constitution and rebuilt a special relationship with Hawaii indigenous people. Their special relationship is not 'making the other', but confirms the political relationship between two equal sovereignties.[20] Therefore, extensive interpretation of multiculturalism, which affirms indigenous peoples' parallel temporality and sovereignty, can reconstruct a new constitutional structure. Only when the Constitution recognises multicultural coevalness[21] can it support the existence of *sui generis* rights.[22]

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[18] Huang, 'Interpreting the Rights of Indigenous Peoples under the Constitutional Scheme' (n 13) 31.

[19] On November 23, 1993, the Senate and the House of the United States Congress passed the Joint Resolution, 'to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.' (S. Joint Res. No. 19, Pub.L. No. 103-150, 107 Stat. 1510 (1993)).

[20] Huang, 'Indigenous Intellectual Creations and Sui Generis: A Critical Interpretation of the New Protection Act for the Traditional Intellectual Creations of Indigenous Peoples (傳統智慧創作與特殊權利──評析「原住民族傳統智慧創作保護條例」)' (n 15) 22.

[21] 'Coevalness' proposed by Huang is based on the Anthropologist Johannes Fabien's idea. See: Johannes Fabian, *Time and the Other: How Anthropology Makes Its Object* (Columbia University Press 1983). Fabien's 'coevalness' will be analysed in Section 5.1.2.

[22] Huang, 'Indigenous Intellectual Creations and Sui Generis: A Critical Interpretation of the New Protection Act for the Traditional Intellectual Creations of Indigenous Peoples (傳統智慧創作與特殊權利──評析「原住民族傳統智慧創作保護條例」)' (n 15) 23.

In Canada's legal practice, the *sui generis* rights are related to the indigenous peoples' rights. Being regarded as different from other common law rights, *sui generis* doctrine applied in the interpretation of indigenous peoples' rights tries to emphasise the equal status of indigenous society with other groups in Canada and respect their unique historical experience and life style.[23] However, it is also argued that *sui generis* doctrine should 'reformulate similarity and difference and thereby captures the complex, overlapping and exclusive identities and relationships of the parties'.[24] It should work as 'a bridge', which negotiates different legal systems[25] and builds the connection between the state's law and customary law.

Consequently, the *sui generis* right should not have only one destiny: being criticised to create 'the other'. It can be interpreted as support for parallel sovereignty and temporality and it can avoid the neo-colonial perspective that emphasises indigenous people's 'difference'. It can also become a bridge to negotiate different legal systems. If the *sui generis* right is correctly interpreted in the international human rights and the constitutional perspective, it will be possible to reconstruct an equal relationship and open the space of negotiation between indigenous peoples and the modern state. In the international IP forum, *sui generis* rights also require the legal position for indigenous peoples' participation in order to respond to their parallel sovereignty.

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[23] John Borrows and Leonard I Rotman, 'The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?' (1997) 36 Alberta law review 9, 10–11.

[24] ibid 11.

[25] ibid 44.

Of course, *sui generis* rights cannot automatically secure a nation-to-nation relationship between the modern state and indigenous peoples. At the national level, it is argued that three foundations should be fulfilled to support indigenous peoples' parallel status: (1) indigenous peoples' self-determination, self-autonomy and self-government, (2) protections of indigenous peoples' land, traditional territories and natural resources, and (3) substantial political participation of indigenous peoples.[26] Of course, building a *sui generis s*ystem in the modern state is an ongoing project. The claims of indigenous peoples' to self-government, land, natural resources and substantial political participation has never been practised very well, either in Taiwan or in any country in the world. But building a good practice of the Protection Act can be the first step to and an important part of the basis of indigenous peoples' parallel sovereignty.

5.1.2 Coevalness Recognised by the Protection Act

(1) What is Coevalness?

As mentioned in the last section, Chun-Chen Huang emphasises the importance of the idea of 'coevalness' to interpret multiculturalism in Taiwan's Constitution. He emphasises that *sui generis* rights are deeply related to coevalness:

[26] Chih-Wei Tsai, The Survey of Indigenous Peoples' Customs: Puyuma and Saisiyat (原住民族傳統習慣之調查、整理及評估納入現行法制研究--卑南族、賽夏族：結案報告) (Eastern Taiwan Society of Arts (財團法人東台灣研究會文化藝術基金會) 2009) 185; Shun-Kuei Chan, 'The Difficulty of Realizing Indigenous Peoples' Rights to Land and Natural Resources under Existing Legal System: A Discussion Starting from the Taidong Beautiful Bay Ligation and the Smangus Case (國家法制高牆下實現原住民族土地與自然資源權利的困境--從美麗灣度假村旅館的開發案及司馬庫斯櫸木案談起)' (2011) 4 Taiwan Journal of Indigenous Studies 183, 186.

> Only when we recognize coevalness by Multiculturalism can the sui generis system exists in the Constitution of the modern state. Sui generis rights are based on the meaning of time. Its principle and structure is special, and does not belong to the system of jus civile... However, two systems cannot be determined which is better. Both systems have no visions of unifications or assimilation with each other.[27]

Huang cites Johannes Fabian's book *Time and the Other: How Anthropology Makes Its Object*[28] as his theoretical basis of 'coevalness', but does not further explain why and how an anthropologist's reflection and examination on anthropological writing can influence the interpretation of Taiwan's Constitution in his article. Therefore, Fabian's idea of coevalness is explored in this section.

Fabian's famous idea of 'coevalness' is originally a criticism of how anthropology makes its research object as the Other by 'the denial of coevalness.' [29] Influenced by Said's *Orientalism*, Fabian argues that in anthropological writing, anthropologists and the people they research do not exist 'in the same time'. Anthropologists often perform 'a denial of coevalness' by using terms such as"primitives," "savages," or "traditional", and these anthropological discourses have justified colonial domination of the Others. However, Fabian also points out that in anthropological fieldwork, coevalness and the sharing of time (what he calls 'the Intersubjective Time') are the preconditions of communication

[27] Huang, 'Indigenous Intellectual Creations and Sui Generis: A Critical Interpretation of the New Protection Act for the Traditional Intellectual Creations of Indigenous Peoples (傳統智慧創作與特殊權利──評析「原住民族傳統智慧創作保護條例」)' (n 15) 23.

[28] Fabian (n 21).

[29] The definition of denial of coevalness is that 'a persistent and systematic tendency to place the referent(s) of anthropology in a Time other than the present of the producer of anthropological discourse.' See: ibid 31.

between anthropologists and culture and people they observe, because 'for human communication to occur, coevalness has to be created. Communication is, ultimately, about creating shared Time.'[30] He points out the contradiction between anthropological writing and anthropological fieldwork and encourages the attempts of recognition of coevalness in anthropological writing.

Two of his suggestions for anthropological studies in the end of his book *Time and the Other* can also be a reminder to consider *sui generis* rights. First, he encourages the development of a processual and materialist theory to counteract most anthropologists' denial of coevalness.[31] This means that more observations of the process and practice whereby societies produce their material and cultural goods are needed. Second, Fabien expects more inquiries 'into the history confrontation between anthropology and its Other,' which are ways to 'meet the Other on the same ground, in the same Time'.[32]

Although coevalness should be considered when building a dialogue between parallel sovereignties of the modern state and indigenous peoples, the questions proposed by Fabian should also be explored: 'Is not the theory of coevaless a program for ultimate temporal absorption of the Other? ... Are there criteria by which to distinguish denial of

[30] ibid 30–31.

[31] ibid 156–157.

[32] ibid 165.

coevalness as a condition of domination from refusal of coevalness as an act of liberation?'[33]

The discourse of coevalness or 'meet the Other in the same Time' cannot be used to erase other cultures' trajectories of temporality or stories in order to seek for a unified community, because it will retrieve colonial discourse claiming 'universal' time. It is worth exploring Homi Bhabha's postcolonial perspective in order to understand coevalness. Responding to Benedict Anderson, who contends that the imagined community of the nation deeply relies on the community's sense of homogeneous time and 'meanwhile',[34] Bhabha proposes that 'the "meanwhile" is the sign of the processual and performative, not a simple present continuous, but the present as succession without synchrony—the iteration of the sign of the modern space.'[35] He emphasises that 'there is no synchrony but a temporal break, no simultaneity but a spatial disjunction.'[36] Although indigenous peoples are included under the structure of Constitutional dialogue with the modern state, they should not be simply supposed to be synchrony in the modern nation's space.

Neither ***the same***, nor ***the Other***, different indigenous peoples in Taiwan have ***hybrid*** and multiple time that has tried to negotiate with the modern law system. The dialogue platform between the state and indigenous peoples and the multicultural Constitution

[33] ibid 154.

[34] Homi K Bhabha, *The Location of Culture* (Routledge 1994) 159.

[35] ibid.

[36] ibid.

should based on *intersubjective time*, that is, dialogue taking place in time between individuals as communicative subjects who all share that time with each other. Coevalness should aim to 'recognise contemporarily as the condition for truly dialectical confrontation between persons as well as societies.'[37]

(2)The Protection Act and Indigenous Peoples' Sovereignty

The *ratio legis* of the Protection Act drafted by the Executive Yuan [38] refers to international and domestic legal resources to certify the legitimacy and urgency of the Protection Act and *sui generis* rights:

(1) Article 3, *Principles & Guidelines for the Protection of the Heritage of Indigenous People:*[39] 'Indigenous peoples should be recognized as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future.'

[37] Fabian (n 21) 154.

[38] The Executive Yuan is the highest administrative agency in Taiwan. The Executive Yuan's proposal of the Protection Act is one of the main resources for the Legislative Yuan (Taiwan's Congress) to pass the law. The Executive Yuan's proposal of the Protection Act, see: Legislative Yuan, Agenda Related Documents, Yuan-Tzung-No.1722, Governmental Proposal No.10043 (立法院議案關係文書，院總第 1722 號，政府提案第 10043 號) 2005.

[39] Principles & Guidelines for the Protection of the Heritage of Indigenous People is elaborated by the Special Rapporteur, Mrs. Erica-Irene Daes, in conformity with resolution 1993/44 and decision 1994/105 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, Economic and Social Council, United Nations (E/CN.4/Sub.2/1995/26, GE. 95-12808 (E), 21 June 1995).

(2) *United Nation Declaration on the Rights of Indigenous Peoples*: the Declaration had been the draft when the Protection Act was proposed. Article 12[40] and Article 29[41] were referred by the draft.

(3) *Tunis Model Law on Copyright for Developing Countries*: The Tunis Model Law on Copyright was adopted by the Committee of Governmental Experts convened by the Tunisian Government in Tunis from February 23 to March 2, 1976, with the assistance of WIPO and UNESCO. The Executive Yuan suggests that 'Tunis Model Law includes indigenous peoples' traditional cultural expressions into the copyright protection framework. Compared to the UN documents described above, Tunis Model Law provides more substantial meanings to the draft Protection Act. '

(4) Article 10, Paragraph11 of *the Additional Articles of the Constitution, Taiwan*: 'The State affirms multiculturalism and shall actively preserve and foster the development of aboriginal languages and cultures.' The draft contends that the Additional Articles can be the constitutional foundation for the legal protection of indigenous people's TCEs.

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[40] Article 12 of United Nations Declaration on the Rights of Indigenous Peoples: 'Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.'

[41] Article 29 of United Nations Declaration on the Rights of Indigenous Peoples: '1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.'

(5) Article 13 of *the Indigenous Peoples Basic Law*, 'The government shall protect indigenous peoples' traditional biological diversity knowledge and intellectual creations, and promote the development thereof. The related issues shall be provided for by the laws.' The Protection Act is proposed for responding to 'the related issues' mentioned in Article 13.

The draft mentions that 'with reference to the legal development in the international society and responding to Taiwan's local demands, the Protection Act is drafted.' In other words, both the administrative agency who drafted the Protection Act and the legislators who passed it had very clear intention to include the Protection Act in the legal framework of the UN Human Rights and UN guidelines regarding IP, though Taiwan cannot become a member of United Nations due to the complicated international politics. Meanwhile, the Protection Act responded to multiculturalism and the goal of culture preservation prescribed in Taiwan's Constitution and the Indigenous Peoples Basic Law, and showed its clear acknowledgement of the local demands of indigenous peoples.

According to the discussion mentioned in the last section about the connection between recognition of coevalness and the Constitution, Huang argues that the Protection Act has 'established itself as a completely new *sui generis* system parallel to the state's property law'.[42] He contends that 'such a new Act, which without precedent introduces the sui generis into a non-lineal pattern of constitutional paradigm, is expected to trigger heavy

[42] Huang, 'Indigenous Intellectual Creations and Sui Generis: A Critical Interpretation of the New Protection Act for the Traditional Intellectual Creations of Indigenous Peoples (傳統智慧創作與特殊權利──評析「原住民族傳統智慧創作保護條例」)' (n 15) 46.

struggles over the issues pertaining to multiculturalism…and consequently affect the application of the indigenous cultural creations per se.'[43] For him, parallelism and coevlness,[44] which support a new *sui generis* system, influence the interpretation and enforcement of the Protection Act.

It is argued by some scholars that indigenous peoples' parallel sovereignty is confirmed in the Protection Act. Since *sui generis* rights are parallel to civil IP law, Article 22 of the Protection Act provides that 'the provision of the Protection Act shall not affect the rights of the exclusive right owner of the intellectual creation and the third party derived from other laws.'[45] The indigenous people's coexistence and parallelism should be confirmed through sui generis rights. The legal reasons for Article 22 of the Protection Act suggest that 'although the exclusive rights of TCEs will be protected by this Protection Act, the right owner can simultaneously choose any other laws (e.g. the Preservation of Cultural Heritage Act) to protect their TCEs.'

[43] ibid.

[44] Aside from parallelism and coevalness, Huang suggests that 'retrospectivity' is also supported by the Protection Act. He argues that the rights protected under the Protection Act 'shall take effect retrospectively, which means there will be no vested rights for the current civil law IP which may contain indigenous people's registered TCEs.' The retrospective effect is 'a typical application of general theory of inter-temporal law, i.e., a necessary result of transformative justice.' Huang, 'Legalizing Community Resources — Experiences Learned from Implementing the Indigenous Traditional Intellectual Creations Protection Act (ITICPA)' (n 13) 32. Also see: Huang, 'Indigenous Intellectual Creations and Sui Generis: A Critical Interpretation of the New Protection Act for the Traditional Intellectual Creations of Indigenous Peoples (傳統智慧創作與特殊權利──評析「原住民族傳統智慧創作保護條例」)' (n 15). However, there is disagreement regarding the retrospective effect of *sui generis* rights in the Protection Act , see: Chung-Hsin Chang, 'The Past and the Future of the Protection of Indigenous Peoples' TCEs (原住民族傳統智慧創作保護之過去與未來)' in Chen-Fa Tung (ed), *The Future of the Past: Selected Papers from the 2016 Conference of Creation and Protection of the Indigenous Traditional Knowledge* (College of Indigenous Studies, National Dong Hwa University 2016) 17–18, 22–23.

[45] Huang, 'Legalizing Community Resources — Experiences Learned from Implementing the Indigenous Traditional Intellectual Creations Protection Act (ITICPA)' (n 13) 33.

It is argued by Huang that the public domain, which belongs to the idea of civil IP law, will not be applied in *sui generis* rights.[46] Therefore, under the Protection Act the rights are permanently protected,[47] which follows the logic of parallelism and coevalness. Finally, the protection will not expire even though the right owner no longer exists, so Article 15, Paragraph 2 of the Protection Act provides that 'If the exclusive user of intellectual creations ceases to exist, the protection of the exclusive right thereof shall be deemed to have survived; the exclusive right to use shall instead belong to the entire indigenous peoples.' Article 7, Paragraph 3 also states that 'no subject matter will be characterised as res nullius or public domain':[48] 'If an intellectual creation cannot be confirmed to belong to any specific aboriginal group or tribe, the rights shall be registered under the entire indigenous peoples. The entire indigenous peoples will obtain the exclusive right to use such intellectual creation starting from the date of registration.'

5.2 Rejecting Colonial Naming and Categorisation

As discussed in Chapter 2, the colonisers had legitimate reasons to carry 'civilisation' to the colonised, because they claimed that cultures of the colonised were empty, uncivilised, primitive, and less developed than their own. In order to have access to any ownership and entitlements, indigenous peoples first needed to be named and 'to be accorded a

[46] Huang, 'Indigenous Intellectual Creations and Sui Generis: A Critical Interpretation of the New Protection Act for the Traditional Intellectual Creations of Indigenous Peoples (傳統智慧創作與特殊權利──評析「原住民族傳統智慧創作保護條例」)' (n 15) 31.

[47] Article 15, Paragraph1 of the Protection Act: 'The exclusive right to use intellectual creations shall be protected permanently.'

[48] Huang, 'Legalizing Community Resources — Experiences Learned from Implementing the Indigenous Traditional Intellectual Creations Protection Act (ITICPA)' (n 13) 33.

status among the "civilized"'[49]. However, it is argued that the indigenous peoples should reject 'European tropes of discovery, invention, naming, and originality concepts which animate modern intellectual property laws.'[50]

The Protection Act has acknowledged that indigenous peoples' TCEs do not fit Western naming systems and legal categories provided by conventional IP law. Therefore, Article 3 of the Protection Act prescribes the definition of TCEs:

> The traditional cultural expressions referred to in this Act shall mean traditional religious ceremonies, music, dance, songs, sculptures, weaving, patterns, clothing, folk crafts or **any other expression of the cultural achievements of indigenous peoples**. (Emphasis added.)

In this Article, it is true that the copyright categories such as music, dance, songs, and sculptures still exist. However, 'any other cultural expression of the cultural achievements of indigenous peoples' provided by Article 3 can also be protected even though it may be difficult to name or categorise that TCE.

[49] Kathy Bowrey and Jane Anderson, 'The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?' (2009) 18 Social & Legal Studies 479, 485.

[50] Angela R Riley, 'Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities' (2000) 18 Cardozo Arts & Entertainment Law Journal 175, 190.

Moreover, according to Article 13 of *Enforcement Regulations Governing the Protection of Indigenous Peoples' Traditional Cultural Expression* ('Regulations Governing TCEs'),[51] the application of registering TCEs can be written in indigenous peoples' own language. If necessary, the Council of Indigenous Peoples can require the applicant to provide a translation or further explanation. Consequently, indigenous peoples can give up the old names given by the coloniser, and use their language to name and explain their culture in the process of registration.

Observing indigenous peoples' 120 applications for registration, which can be found in a complete list in the next chapter (see: Table 2), many tribes and peoples use their own language to name their TCE. They believe that only their own language can explain the real meaning and process of their rituals. For example, the *Puyuma* people used *muhamut* instead of 'the ritual after women complete weeding'(婦女除草完工祭), which was the name used by the anthropologist and the government to describe their sacred ceremony. The *SaySiyat* people's famous ceremony *paSta'ay* was also reinstated, rather than using the popular name known by the tourists, 'the ceremony of short people' (矮靈祭). These ceremonies and rituals used to be well known by their Chinese names, which reflected mainstream culture's misunderstanding and stereotype with regard to their sacred ceremonies and could not represent the abundant meanings by means of the coloniser's language. Registering the genuine name used by its owner is the basic requirement for the state to recognise indigenous peoples' subjectivity. Challenging the necessity of

[51] Regulations Governing TCEs is the by-law of the Protection Act, made by the Council of Indigenous Peoples, in order to facilitate the implementation of the Protection Act.

official language and colonial categories, the Protection Act supports the first step to enhance the indigenous peoples' parallel sovereignty.

As Bhabha's criticism quoting from Walcott's poem, *Names*, in Section 3.1 indicates, the colonised should have a name given by the coloniser before the colonised can claim their right. Therefore, the way indigenous peoples choose to accept or reject the colonial name is always a dilemma. Bhabha refers to the same poem of Walcott, and agrees Walcott's strategy to go beyond the binaries between the pedagogy of the imperialist noun and the native voice: 'not simply by denying the imperialist the "right of everything to be a noun" but by questioning the masculinist, authoritative subjectivity produced in the colonising process.'[52] Indigenous peoples' claiming *the right to signify*[53] is not an yearning for the past, but the primary step by which indigenous peoples can enter the process of questioning the state's colonising power. Reinstating the name of TCEs is also a part of the promise of the New Partnership—i.e. that the government should reinstate traditional names of indigenous communities and natural landmarks.

5.3 Confirmation of Group Rights (and Its Discontent)

Responding to the criticism that IP excludes knowledge that takes place in the 'intellectual commons',[54] Article 6 of the Protection Act recognises that the owner of TCEs shall be a

[52] Bhabha (n 34) 233.

[53] ibid.

[54] Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (Green Books 1998) 15.

group of indigenous people: 'the applicant…is limited to indigenous tribes or peoples…'.[55] The Protection Act has tried to revise the rigid idea of copyright, which cannot protect any creation without finding the specific author(s).

As a group, the right holder of TCEs owns both the moral right and the property right relevant to the registered TCE. Article 10 of the Protection Act defines indigenous peoples' exclusive property and moral right to use TCEs:

> Article 10
>
> The exclusive right to use TCEs shall mean the property rights and moral rights of TCEs.
>
> The owner of an exclusive right to use TCEs enjoys the following moral rights:
>
> 1. the moral right to publicly release the work.
>
> 2. the moral right to indicate the name of the exclusive user.
>
> 3. the moral right to prohibit others from distorting, mutilating, modifying, or otherwise changing the content, form, or name of the work, thereby violating the exclusive user's reputation.
>
> The owner of the exclusive right to use TCEs shall exclusively use and profit from the property rights of such TCEs and exercise the rights mentioned in the previous paragraph **on behalf of specific tribes, people or indigenous peoples as a whole**, unless otherwise stipulated by law or agreement.
>
> Indigenous individuals are entitled to use and profit from the TCEs of their tribes, peoples or the indigenous peoples as a whole and shall not be subject to the limitations stipulated in Article 14. (Emphasis added).

[55] Article 6 of the Protection Act:

> The applicant for any intellectual creation shall provide a written application, a specification, necessary graphics, images and related documents or provide audio-visual creations in order to apply for registration with the competent authority.
>
> **The applicant mentioned in the previous paragraph is limited to indigenous groups or tribes** and a representative shall be elected to take care of all matters arising. The regulations of electing representatives shall be determined by the competent authority. (Emphasis added).

In the structure of the Protection Act, the 'group' has a boundary, but does not refer to specific individuals. In a group, existing members may die or leave the group, and new members will appear by birth, marriage, or migration, but the group as a whole remains entitled to be the holder of TCEs. Once the entitlement is granted by law to an indigenous group, it will be a permanent legal protection. The Protection Act recovers indigenous peoples' collective entitlement, which is the basis of recognition of indigenous peoples' sovereignty. It also recognises the permanent exclusive rights over TCEs and does not adopt copyright's limited period of protection, which can also be interpreted as the respect of indigenous peoples' meanings of time.

However, if collective ownerships are over-emphasised and become the only choice that indigenous people can claim, *Orientalism* is still hard to escape in the Protection Act, since collective ownership has never been the only form of property rights in indigenous tribes. [56] The interests involved in TCEs cannot be interpreted as the mutual exclusiveness in terms of individual versus collective rights.[57]

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[56] By comparison, Article 4 of the Pacific Model Law provides the flexible definition of the owner of TCE, which can be the group or the individual:

'traditional owners of traditional knowledge or expressions of culture means:

(a) the group, clan or community of people; or

(b) the individual who is recognized by a group, clan or community of people as the individual;

in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community.'

[57] Christoph Beat Graber, 'Can Modern Law Safeguard Archaic Cultural Expressions? Observations from a Legal Sociology Perspective' in Christoph Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International 2009) 173.

In Taiwan, indigenous tribes and peoples have diverse property systems, so the Protection Act, which merely recognises a rigid kind of collective ownership, cannot reflect indigenous peoples' diverse meanings of property. In fact, joint ownership and private ownership coexist in many indigenous tribes. As a result, if TCEs can merely be jointly owned by the entire members of indigenous tribes or peoples, this will lead to the misunderstanding that indigenous culture is homogeneous and the way by which indigenous peoples handle and perform their TCEs will be manipulated accordingly.

On the other hand, the term 'property' is a translation that might misguide the meaning of indigenous peoples' TCEs. Cultural, political, economic and social aspects of 'property' in different indigenous peoples may not be interpreted by a single Western property system[58] or by the binaries between individual property and collective property[59]. There is complicated differentiation within different communities, and individual or communal ownership/custodianship may coexist in a single community.[60] I will use the *Atayal* people's[61] and the *Amis* people's idea of property as concrete examples, which will be

[58] Michael F Brown, 'Heritage as Property' in Katherine Verdery and Caroline Humphrey (eds), *Property in Question: Value Transformation in the Global Economy* (Bloomsbury Academic 2004) 55; Kristen A Carpenter, Sonia K Katyal and Angela R Riley, 'In Defense of Property' (2009) 118 The Yale Law Journal 1022, 1027–1028.

[59] As Gibson argues, 'communal custodianship and subjectivity… is not a simple opposition to this individual model of self….In traditional and Indigenous philosophies of communalism, individual subjectivity is premised upon community and indeed the being of personhood is impossible without community.' See: Johanna Gibson, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (Ashgate 2005) 160–161.

[60] ibid 44–53, 169–170.

[61] The *Atayal* tribes are distributed in the northern part of Taiwan's Central Mountain areas. According to Taiwan government's statics of 2017, the population of the *Atayal* people is 88,571. It is the third largest indigenous people in Taiwan. Their fabric-weaving skills and designs of sophisticated patterns are very famous. For a brief official introduction of the *Atayal* people, see:

briefly described in the following. The *Atayal* and *Amis* ideas of property will disclose difficulties when indigenous peoples' property is translated to the legal terms of the Western property law and the Protection Act. The first difficulty is the tribe's complex coexistence of personal and joint ownership and the second is the tribe's different meaning of 'ownership'.

(1) Coexistence of personal and joint ownership

Generally speaking, the *Atayal* people adopt both personal and joint ownership. When there are fewer inhabitants in the tribe, the tribe adopt joint land ownership. If the tribe expands its territory, a system of privately owned land will be adopted. Moreover, most *Atayal* people have clear concepts of private property with regard to the *Atayal* people's houses, clothes and tools. They can be owned either by individuals or households.[62]

Taking the *Amis* people as another example: the classifications of *Amis* people's properties are numerous. Like the *Atayal* people, joint ownership and individual ownership also coexist in *Amis* tribes. Joint ownership is applied in their tribe-owned property and family-owned property. To be more specific, the tribe-owned property includes sea, mountains, cemeteries, rivers, and grassland,[63] while the family-owned property

The Council of Indigenous Peoples, 'Atayal: Introduction' (*The Council of Indigenous Peoples*) <https://www.apc.gov.tw/portal/docList.html?CID=F1AE8ACB51E1D504> accessed 21 March 2018.

[62] Shu-Ya Lin, 'Interpretations of Indigenous Property Rights (差異而不平等－原住民族產權特殊性的理解)' (2011) 1 Journal of the Taiwan Indigenous Studies Association 103, 105.

[63] Safulo K. Raranges, 'Amis Traditional Society and Property System (阿美族傳統社會組織與財產制)' (2001) 1 Journal of the Taiwan Indigenous Studies Association 1, 9–10.

includes houses, paddy fields, upland fields, ploughs and wells.[64] In contrast, the objects that can be owned by individuals are fishing nets, bows, arrows, pocket knives, shoulder-bags and slippers.[65]

Indigenous peoples do have individual rights, but as many researchers romanticise indigenous peoples' merits of 'share', ownership-in-common has been misunderstood as being the only mode of indigenous peoples' property. Moreover, joint ownership in the tribe is not limited to being co-owned by the tribe or the people, as Article 6 of the Protection Act supposes: 'the applicant…is limited to indigenous tribes or peoples…'. According to *Amis* custom, noble families, groups of hunting, age class, and priest families are all possible subjects entitled to claim joint ownership. In Chapters 6 and 7, *Pakedavai*'s application in the process of registration is also an example of the sub-group in the tribe challenging the Orientalist imagination of group rights.

(2) The different meaning of 'ownership'

Erica-Irene Daes points out in the report of the UN Commission on Human Rights:

> Indigenous peoples do not view their heritage in terms of property at all - that is, something which has an owner and is used for the purpose of extracting economic benefits - but in terms of community and individual responsibility. Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and

[64] ibid 10–11.

[65] ibid 11.

> places with which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights.[66]

It may not be argued that every indigenous community in the world holds the same attitudes towards their heritage, but indeed, we can find some communities that see ownership as a bundle of relationships and responsibilities rather than economic rights.

The *Tafalong* tribe, a famous *Amis* tribe, is an example. In *Tafalong*, people do have the language to describe personal relationship, such as 'me', 'mine' and 'ours.' *Tafalong* land used to be assigned by the ruling family, *Kakita'an*,[67] to the tribe's communities, organisations, individuals and wanderers. However, the term 'mine' does not represent merely 'ownership' but also focuses on 'my responsibility'. When a person is allocated a piece of land of *Tafalong*, he or she is also assigned the personal responsibility for it.[68]

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[66] Erica-Irene Daes, 'Discrimination against Indigenous Peoples: Study on The Protection of the Cultural And Intellectual Property Of Indigenous Peoples' (The UN Commission on Human Rights 1993) E/CN.4/Sub.2/1993/28 para 26.

[67] As the founder of the *Tafalong* tribe, the *Kakitaan* family was in charge of the administration, jurisdiction, property rights and religious rituals of the tribe in the past. See: Academia Sinica, 'The Carved Pillars of the Kakitaan Shrines in the Tafalong Tribe of the Amis' (*National Cultural Heritage Database Management System*, 9 February 2012) <https://nchdb.boch.gov.tw/English/cultureassets/Antiquity/upt.aspx?assetsClassifyId=6.1&p0=5222> accessed 24 April 2017.

[68] Namoh Nofu Pacidal, 'In the Human History, the Most Ancient Political Body Is Not the State, but Niyaro (the Tribe). (人類史上存活最久的政治體制不是國家，是部落)' <https://www.facebook.com/notes/namoh-nofu-pacidal/1284670811546443/>. Namoh Nofu Pacidal is a member of the *Tafalong* tribe, an activist for indigenous peoples' independence, and an outstanding *Amis* researcher. However, not all his essays can be published in academic journals, because the style of his writing and research does not always fit the requirement of academic journals. This phenomenon also shows how difficult the indigenous people's perspective and discursive style can negotiate with the mainstream journals of indigenous people research. Fortunately, his research and perspectives can be found on his personal Facebook page: <https://www.facebook.com/namoh.nofu/notes?lst=589707742%3A751998774%3A1521604254> accessed 19 September 2018.

The *Smangus* tribe, an *Atayal* tribe, can also be used as an example to examine the meaning of property. Currently, the *Smangus* tribe has been described as a tribe practising the property system of common-ownership,[69] but in reality their idea of property is more complicated. The *Smangus* tribe issued a tribal covenant in 2004[70] and confirmed the organisation of '*Tnunan-Smangus*' (jointly owned *Smangus*).[71] It is noted in the Article 3 of the Covenant of *Smangus* that

> for the purpose of maintaining the tribe's subjectivity, the land in *Smangus* shall not be sold, rented, and transferred to non-*Smangus* members. It is also forbidden that tribal members enter a partnership with non-tribal members to invest and manage tribal land. The car, water-pipe and utility pole of the offenders shall be prohibited to cross the land and access roads of other tribal inhabitants.

Article 4 further states that, 'Tribal land, no matter private or communal, shall not be transformed its usage or be excavated in a large scale without the tribal meeting's discussions and permits.'

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[69] Hao-Jen Wu and Chu-Cheng Huang, 'From Smangus Tribal Covenant to Communal Indigenous Property (對市民財產制度的再檢視：由司馬庫斯部落公約到自然資源的歸屬)' (2006) 3 Taiwan International Law Quarterly 207, 257–258.

[70] See: 'The Covenant of Qalang Smangus' <http://www.meworks.net/meworksv2/meworks/page1.aspx?no=4067> accessed 17 September 2018.

[71] Pei-Jan Hsu, 'Tnunan-Smangus: A Practice of Tribal Self-Government (司馬庫斯勞動合作社:部落自治的具體實踐)' *Coollord* (Teipei, 14 September 2009) <http://www.coolloud.org.tw/node/46471>.

Observing these Articles, the tribe designed a way to manage their land and seek a balance of private property under the modern state's legal system and communal property under the tribe's management. The sense of property is not 'traditional'; it is a merging of traditional and modern. In addition, according to the Covenant of *Smangus*, the main purpose of the innovative property management is the protection of tribal environment and ecology, which is not the conventional aim of the capital market or modern property law.[72]

According to the diverse styles of indigenous peoples' ownership, two main issues should be reconsidered within the structure of the Protection Act: Firstly, who shall be the claimant under the Protection Act? Secondly, who is eligible to manage the profit?

(1) Who shall be the claimant?

As Shu-Ya Lin concludes, indigenous peoples around the world often face the same problem: Settler colonists immigrated in indigenous peoples' territories, but refused to be members of indigenous peoples' communities and also refused to follow the rules of indigenous peoples' property management. On the contrary, settlers established their own political institutions and property systems based on their own tradition in indigenous peoples' land without its legitimacy being questioned. Ironically, current academic discussions have shifted the burden of proof from the latecomers to indigenous people and the questions are reversed and presented as 'how do indigenous peoples provide convincing arguments and evidence to persuade the modern state to recognise

[72] Wu and Huang (n 69) 257–258.

the indigenous people's property system?'[73] It is an unfair question and requirement for indigenous peoples.

As the first legal attempt to perform quasi nation-to-nation relationship, the interpretation of the Protection Act should respect diverse local property systems of indigenous peoples. Ownership in the Protection Act should be to the greatest extent possible be determined by the applicants. Therefore, the Protection Act should not be restricted to TCEs owned by indigenous tribes or peoples. Indigenous households, families, or other smaller groups within the tribe should also be legal subjects entitled to be the owner of TCEs.

In practice, the Council of Indigenous People currently accepts that the applicants are not the tribe or the people. The applicants can also be a family or a specific group in the tribe. For example, *Pakedavai*, a noble family in the *Tjaravacalj* tribe, has been accepted as the sole applicant to register their TCEs. The application process of *Pakedavai* will be explored further in the next chapter.

On the other hand, the Protection Act offers some possibilities that TCEs can jointly owned by more than one tribe or one people. Tribes and peoples can collectively own TCEs with other tribes and peoples. If it is difficult to tell to which group a TCE belongs, such a TCE

[73] Lin (n 62) 104.

can be owned by the indigenous peoples as a whole. Three possible rules defining the ownership of TCEs are prescribed in Article 7 of the Protection Act:

> Article 7 Upon being recognised as TCEs, the exclusive right to use such TCEs shall be obtained according to the following rules:
>
> 1. Once **the applicant** is confirmed to be the owner of a TCE, registration shall be approved. And starting from the date of registration, the applicant shall obtain the exclusive right to use such TCEs.
>
> 2. If a TCE is confirmed to belong to the applicant and other specific indigenous tribes or peoples, **the applicant and other indigenous tribes or peoples shall jointly obtain the exclusive right to use the TCE** starting from the date of registration.
>
> 3. If an intellectual creation cannot be confirmed to belong to any specific indigenous tribe or people, **the rights shall be registered under Taiwanese indigenous peoples as a whole.** The indigenous peoples as a whole will obtain the exclusive right to use such TCE starting from the date of registration. (Emphasis added.)

(2) Who is eligible to manage the profit?

Article 10 of the Protection Act quoted above prescribes that the owner of TCEs shall exercise the rights 'on behalf of specific tribes, peoples, or the indigenous peoples as a whole'. Therefore, incomes from the exclusive right to use TCEs shall be used to set up a fund, which can only benefit the relevant indigenous groups or tribes, as Article 14 of the Protection Act prescribes:

> Article 14
> If the exclusive right to use any TCE is obtained by an indigenous tribe or people…, the income derived there from **shall be used to set up a common fund benefiting the relevant indigenous tribes or people;** the income, expenses, method of custody and utilisation in connection thereto shall be determined separately by the competent authority.

> If the exclusive right to use TCE is obtained by the indigenous peoples in their entirety, the income derived there from shall be included in the consolidated development fund of the indigenous peoples and be utilized for the purpose of promoting the cultural development of indigenous tribes or peoples.(Emphasis added).

Following Article 14 of the Protection Act, *Regulations of Governing the Common Fund of Indigenous Peoples' TCE Protection* (a by-law of the Protection Act) has been dictated by the Council of Indigenous Peoples. TCEs holders should set up a common fund, and the purpose of the usage of common fund is limited by Article 4 of the Regulations:

> Article 4 of 'Regulations of Governing the Common Fund of Indigenous Peoples' TCE Protection'
>
> The common fund shall be used by the owner of TCEs for the following purposes:
>
> 1. Preservation and Promotion of traditional culture,
> 2. Publication of cultural works,
> 3. Design and distribution of cultural websites,
> 4. Subsidization of cultural and educational institutions and communities,
> 5. Student's scholarship and student loans,
> 6. Cultural and artistic activities; funding on the business of relevant activities; education and sponsorship of cultural workers and artists,
> 7. Payments of litigation or other legal fee for maintaining the exclusive right to use TCEs,
> 8. Other relevant expenses.

Members of management committee of common fund can be appointed according to the tribe's customs. As Article 6, Paragraph 2 *of the Regulations of Governing the Common Fund of Indigenous Peoples' TCE Protection* prescribes*:* 'Members and a convenor shall be elected and appointed by the tribes or peoples that own the exclusive

rights to use TCEs **according to such owner's community rules and customs**.' (Emphasis added).

However, the numbers of members of the management committees are regulated by the state, which is prescribed in Article 6, Paragraph 1 of the *Regulations of Governing the Common Fund of Indigenous Peoples' TCE Protection:*

> Income, Expense, Preservation and Management of the common fund should be examined by the management committee of common fund ('the management committee'). The management committee shall consist of from 5 to 31 members. A convener shall be appointed from among its members. The members' term of office is two year and can be renewed.

The inflexible regulations regarding the term and numbers of committees is not necessary if the purpose of these regulations is to respect indigenous communities and their customs. Take the *Tafalong* tribe mentioned above as an example: the traditional way to decide the distribution of the tribe's property and land is *Kakitaan*. Ignoring the social status of *Kakitaan* and organising another management committee is not the best way to protect their traditional culture. Therefore, since the respect of tribal customs and tradition is the aim of the Protection Act, the state should reduce its control on the rules of the common fund and respect the traditional organisation of tribal property management.

The purpose of the state's regulations should be to protect the tribe from corruption, but it is at the expense of the tribe's subjectivity and ability to manage their own affairs. It is possible that the corruption with respect to the management of communal funds occurs, but tribal members should face their own problems and find their own way to solve them. Moreover, profits from TCEs should not only be managed under the name of the 'common fund', because the local property management in the tribe should be respected. Consideration should be given to revising the *Regulations of Governing the Common Fund of Indigenous Peoples' TCE Protection* in order to respond to the complicated meaning of property and diverse tribal methods of property management.

5.4 Mooting Programmes of the Protection Act

To secure the practicability of the Protection Act and its by-laws, the government chose fourteen indigenous groups as the mooting teams to run the process of applications in 2012. This is a new experiment and a rare case in Taiwan. Before full enforcement of the Protection Act, indigenous tribes and peoples run a mooting program in advance, so the government can collect the feedback from the tribes.[74] By doing so, the government revised the by-laws of the Protection Act based on the experience of the mooting programs. Therefore, the mooting programs can symbolise the cooperation between indigenous peoples and the state to make a better law. Indigenous people's participation and experience plays an important role before the making of law, and this may also provide a lesson for international negotiation regarding the *sui generis* protection of TCEs.

[74] Huang, 'Legalizing Community Resources — Experiences Learned from Implementing the Indigenous Traditional Intellectual Creations Protection Act (ITICPA)' (n 13) 33.

In the mooting programs, some tribes also found their traditional decision-making process on the verge of disappearing. Thus, they used this opportunity to reconsider and reconstruct the new tribal institution of decision-making. We observe that some groups reassembled their tribal congress,[75] and some groups strengthened their existing tribal decision-making body. The details will be discussed in Chapter 6.

5.5 Moving on

According to the analysis in Chapter 4, registration was supposed to be a mechanism by which the government categorised and managed knowledge and culture. However, by observing Taiwanese indigenous peoples' experience, registration can also be performed as a bottom-up system, which enables indigenous peoples to decide if they would like to file the application and which TCE needs to be registered and protected under state law. It has also been suggested that the Protection Act can be a mechanism to reverse the timeline of conventional IP law and rebuild a suitable position in the lineal pattern of the law.[76] Chapter 6 will observe more cases regarding the process of indigenous peoples' applications which challenge the state's control over indigenous peoples and respond to Fabian's suggestion of recognition of coevalness.

[75] ibid 35.

[76] Huang, 'Indigenous Intellectual Creations and Sui Generis: A Critical Interpretation of the New Protection Act for the Traditional Intellectual Creations of Indigenous Peoples (傳統智慧創作與特殊權利──評析「原住民族傳統智慧創作保護條例」)' (n 15) 23.

6 Responding to the Colonial Relationship between the State and Indigenous Peoples

As discussed in Chapter 3, under the state's legal framework, peoples and tribes need to be recognised by the government before they can claim the rights belonging to indigenous peoples. However, beyond the recognised peoples and tribes, many legally unnamed and un-defined indigenous groups still strive for a space to negotiate the modern state's naming system.

The legally unnamed groups attempt to be recognised through the process of registration according to the Protection Act. A case worth exploring is *Pakedavai*, a noble family of the *Paiwan* tribe, claiming to be the sole TCE holder in the registration system. However, Article 6 of the Protection Act prescribes that 'the applicant…is limited to **indigenous tribe** or **indigenous people** and a representative shall be elected to take care of all matters arising.' (Emphasis added).

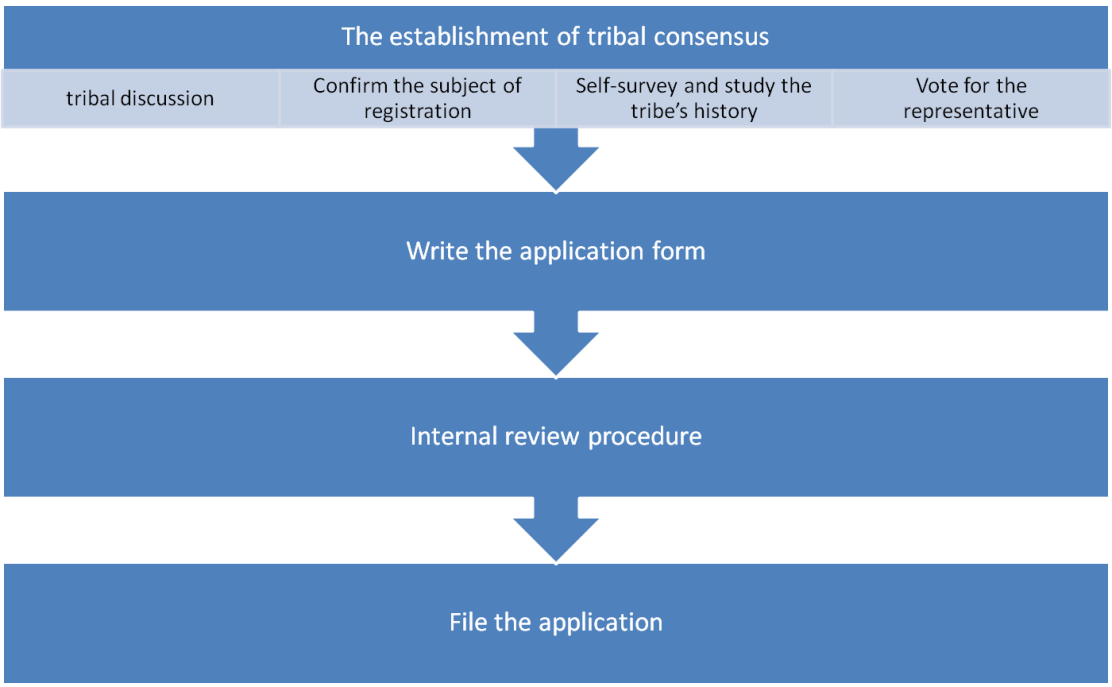
The researchers contend that '*Pakedavai*'s participation represents an important case that the group with certain social status holds the exclusive power to describe their culture,'[1] but the challenge *Pakedavai* faces is that the exclusive power they claim is based

[1] Ying-Tsui Chiu, Pakedavai Zepulj and Dabiliyan Ahlifu, 'The Indigenous Traditional Intellectual Creations Protection Act and the Discourse of Cultural Identity: The Practice of the Pakedavai Family in Paiwan (「原住民族傳統智慧創作保護條例」與身分性文化敘述：排灣族巴格達外家族之實踐)' (2015) 8 Taiwan Journal of Indigenous Studies (台灣原住民族研究季刊) 1, 36.

on tribal customs rather than the state's law. *Pakedavai* chose to participate in the registration because they believe that the Protection Act supports a space and platform allowing them to say who they are. In this section, problems with the process of registering TCEs that *Pakedavai* has experienced will be used as an example to describe how they interact with the shadow of colonialism, including the official recognition of the tribe and the tribal meeting, the application of customary law and appointment of their representatives.

According to the tribe's preparation procedure suggested by the Project Office of Promoting Protection Act (原住民族傳統智慧創作保護推動專案辦公室), there are several steps to facilitate the establishment of tribal consensus.[2] The following sections from 6.1 to 6.4 will follow the Project Office's suggested steps (see Figure 7), to explore indigenous people's actions and negotiations with the state in the process of registering their TCEs.

[2] Chu-Cheng Huang, *Application of Registering Indigenous Peoples' Traditional Cultural Expressions: A Handbook (原住民族傳統智慧創作專用權申請作業手冊)* (The Council of Indigenous Peoples, Taiwan 2015) 71–75.



(Figure 7: The Procedure suggested by the Project Office of Promoting the Protection Act)

6.1 Holding Tribal Meetings

When first considering an application to register TCEs, a tribe or a people should reach a consensus on whether they are willing to register their TCEs and claim their exclusive rights under the Protection Act. The Protection Act sets up the registration system for the discretion of indigenous peoples, either introducing their TCEs into IP system or maintaining a distance from the state's law. As discussed in Chapter 1, from postcolonial perspectives, either way can be performed as indigenous peoples' resistance, according to Bhabha's proposal with regard to the colonised subject's resistance.[3] First, the colonised can choose to return the coloniser's gaze. In this case, indigenous peoples may use the process of registration as 'the strategic reversal of the process of domination…that

[3] BJ Moore-Gilbert, *Postcolonial Theory: Contexts, Practices, Politics* (Verso 1997) 131–132.

turns the gaze of the discriminated back upon the eye of power.'[4] Second, they could also simply refuse to meet the coloniser's gaze. If registration is suspected to be a system which produces stereotypes, indigenous peoples can refuse the coloniser's gaze and choose other methods to protect their own TCEs. As Moore-Gilbert explains Bhabha's idea of the subaltern resistance: 'Thus resistance arises from the subaltern's apparently deliberate attempt to elude the subject positions to which the dominant order seeks to confine the Other in order to confirm itself as dominant.'[5]

To reach tribal consensus, indigenous tribes or indigenous peoples should hold a meeting to confirm the subject matter they would like to register. The Protection Act does not require that the meeting shall follow the regulations of formal tribal meetings described in Section 3.3.[6] It tries to respect local customs and recognise the legal effect of the tribal consensus generated from the tribal traditional decision-making platform.

According to the experience of the mooting programme, the proposed subject matters waiting to be registered are often revised after substantial discussions in the tribal negotiation and decision-making process.[7] Following the Protection Act, applicants

[4] Homi K Bhabha, *The Location of Culture* (Routledge 1994) 112.

[5] Moore-Gilbert (n 3) 132.

[6] As discussed in Section 3.3, a series of governmental regulations of tribal meetings have ignored traditional decision-making systems and created modern tribal meetings strictly monitored by the state. Furthermore, in 2016, the Council of Indigenous Peoples issued administrative regulations claiming that the tribal meeting is the highest authority of indigenous tribes and determines the borderline of the tribal meeting's power.

[7] According to the observation of Ying-Tsui Chiu, the project manager of o the Project Office of the Promotion of the Protection Act, in a public training course and noted by the author on February 1, 2016.

follow their customs as well to reach their consensus. Through rebuilding a forum of substantial discussion according to their customs, they are also establishing the foundation of indigenous peoples' self-government.

A case of rebuilding tribal meeting that we can observe is that of the *Seediq* people. The *Seediq* people found the most difficult part of application was holding meetings. Although the Protection Act and its by-laws do not require formal tribal meetings, it is still hard to organise tribal people for a meeting and to find a place to hold meetings. The meeting and consensus of the *Seediq* people are especially hard due to their being made up of three linguistic groups: *Tgdaya, Toda* and *Truku*.[8] In order to balance the three groups' opinions and find a place that is not far away from three groups' residential area, they have to consider many aspects.

Initially, *Seediq* held tribal meetings in *Alang Tongan*, a well-organised tribe. Currently, they relied on the *Seediq* National Assembly (賽德克民族議會) as the decision-making body. As for the representatives required by the Protection Act in the application, they chose three persons representing the three linguistic groups.[9] The name of the subject

[8] 'Seediq Tribe_General Distribution' (*Taiwan Indigenous Culture Park*) <http://www.tacp.gov.tw/tacpeng/home02_3.aspx?ID=$3136&IDK=2&EXEC=L> accessed 30 March 2016.

[9] However, in the final version of application form of the Seediq traditional house, the representative has changed to one person. The representative is Walis Perlin, the chairman of the Seediq National Assembly. See: The Seediq People, 'The Application Form of Seediq's Traditional House: Structure, Exterior Characteristics and Interior Design (Sapah Cbiyaw/Sapah Cbeyo/Sapah Sbiyaw, 傳統家屋:構造形式、 外型特徵、室內格局)' (*The Website for the Protection of Indigenous People's Traditional Cultural Expressions (原住民族傳統智慧創作保護資訊網)*, 2017) <http://www.titic.apc.gov.tw/ir2015db/sapah-cbiyaw-sapah-cbeyo-sapah-sbiyaw%E5%82%B3%E7%B5%B1%E5%AE%B6%E5%B1%8B-%E6%A7%8B%E9%80%A0%E5%BD%A2%E5%BC%8F%E3%80%81-%E5%A4%96%E5%9E%8B%E7%89%B9%E5%BE%B

matters applied to register is presented by the three languages of three linguistic groups. For example, the *Seediq* traditional house is listed in the *Seediq*'s three native languages: sapah cbiyaw/sapah cbeyo/sapah sbiyaw.[10] Although experiencing difficulties of attending tribal meetings, *Iwan Perlin,* a tribal member dealing with the application, said, 'registration of TCEs is the first step towards our self-government. It is a wonderful feeling, because we sense that we govern ourselves.'[11]

6.2 Confirming Subject Matter

The process of application is still bureaucratic and inefficient, something which will be analysed later, in Chapter 8. However, it is the first time that indigenous peoples can be their own native informant in the official documents and tell their own story without the interpretation of anthropologists. Again, we use *Pakedavai*, the noble family in the *Tjaravacalj* tribe of *Paiwan* People, as an example to describe how they decide their subject matters.

In the beginning of their research, *Pakedavai* found that the written records in the governmental archives did not match their oral story.[12] They reviewed Japanese colonial

5%E3%80%81%E5%AE%A4%E5%85%A7%E6%A0%BC%E5%B1%80> accessed 30 March 2018.

[10] ibid.

[11] The experience of the *Seediq* people described in this section is based on *Iwan Perlin*'s opinion regarding their experience discussed in a public training course and noted by the author on February 1, 2016.

[12] Mei-fang Bao, 'Mythical of Pakedavai: The Conversation between Zepulj and Bead of Rainbow (巴格達外(Pakedavai)神話—日不落與彩虹之珠的對話)' (National Pingtung University 2011) 38.

government reports on the *Tjaravacalj* tribe's customs and found that the traditional leader was mistakenly recorded and *Pakedavai* family's leadership in the tribe was denied in the governmental documents.[13] The coloniser's mistaken records were used to repress the power of the traditional leader and to support the representative who could faithfully obey the coloniser's rules. These documents had originally been produced for the fulfilment of the coloniser's political agenda, but they gradually became the basis of what was supposed to be neutral and reliable academic research.[14]

Noticing these mistaken official records, *Pakedava*i assigned themselves a new mission: they would tell the correct version of their story and register the true meanings of their TCEs in the official records. The application of *Pakedavai*'s TCEs shows that they wished to establish the authority of their narration. When they discussed if they should register their TCEs under the Protection Act, some conversations between the elders and young members of Pakadevai family revealed a new function of TCE registration:

> The elder asked: 'It is no doubt that these cultural expressions belong to Pakedavai. Why should we apply and explain our TCEs to others?'
>
> Young members relied: 'We have never told our stories to the outside world. We are afraid that one day no one will remember that these stories belong to us.'[15]

After several tribal meetings, they decided to apply to register five subject matters, representing their oral tradition and leadership in the tribe: (1) the architecture of the

[13] Chiu, Pakedavai Zepulj and Dabiliyan Ahlifu (n 1) 8.

[14] ibid.

[15] ibid 10, note 22.

traditional leader's slate house (in *Paiwan* language: *inacilai a uma ni Pakedjavai*), (2) the lyrics of *Pakedavai*'s 'family song' (*parutavak ni Pakedjavai*), (3) the procedure of *Pakedavai*'s millet-harvest ceremony (*ni Pakedjavai a sipalisian*), (4) the design and the legend of glass beads in the traditional leader's long necklace (*ni Pakedjavai a sauzayan a qatja*), and (5) the lyrics of the warrior's musical dance in the *Tjaravacalj* tribe (*Zian nuase Tjaravacalj*).[16]

According to the Project Office of Promoting the Protection Act, there are two kinds of TCEs that the tribes often choose to register as priority. One is the TCE that is easily commercially plagiarised, and the other is the most essential cultural symbol in the tribe.[17] For example, the *Seediq* people would like to register its people's name, because a popular commercial film *Seediq Bale* has adopted their name as the film's name, but the profits of the film and the film's derivative goods would not be distributed to *Seediq* people. The *Kavalan* people also applied to register '*Kavalan*', because their name has become the brand name of an award-winning Taiwanese Whiskey and a bus company. On the other hand, the *Taromak* tribe applied the big swing ('*talraisi*') used in their ceremonies. Although the *Taromak* tribe knew that *talraisi* had rare potential to be commercialised or

[16] ibid 10–11. The applied TCEs can also be found in Project Office of the Promotion of the Protection Act, 'Information Regarding Applications of TCEs (智慧創作申請案處理進度資訊)' (*The Website for the Protection of Indigenous People's Traditional Cultural Expressions (原住民族傳統智慧創作保護資訊網)*) <http://www.titic.apc.gov.tw/authorized/progress> accessed 24 March 2018.

[17] The observation was proposed by Ying-Tsui Chiu, the project manager of the Project Office of the Promotion of the Protection Act, in a public training course and noted by the author on February 1, 2016.

plagiarised, the registration of *talrasi* is regarded as a chance for *Taromak* to clarify its cultural meaning to the government and the public.[18]

6.3 Surveying the Tribe's History

The tribe has to survey the historical background of applied subject matters and provide evidence in order to explain their qualification to be the holder of TCEs. Therefore, indigenous people should do their own 'field works' like anthropologists, for example, they should interview the elders of the tribe and check the correctness of notes and records written by previous anthropologists.

It has long been a practice that the collection, recording, management and interpretation of indigenous knowledge and histories are controlled by the colonial state. The coloniser produces uncountable colonial archives to record indigenous peoples, but excludes indigenous peoples' real voice. The problem of colonial archives is not only the content possibly misinterpreted by the others, but also the form and process by which colonial knowledge is produced. Ann Laura Stoler reminds scholars that they should move from 'archive-as-source' to 'archive-as-subject', [19] because the archive is always political and makes its own meaning; it has never been a neutral resource. It has been argued that the research of archives should 'focus on archiving as a process rather than archives as things'.[20]

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[18] The *Taromak* tribe's intention was introduced by Ying-Tsui Chiu, the project manager of the Project Office of the Promotion of the Protection Act, in a public training course and noted by the author on February 1, 2016.

[19] Ann Laura Stoler, 'Colonial Archives and the Arts of Governance' (2002) 2 Archival Science 87, 87.

[20] ibid.

Indigenous peoples utilise the application platform supported by the Protection Act and attempt to challenge the colonial archive. In order to register their TCEs, indigenous peoples should archive anthropological evidence and their own narratives of their own culture. According to Article 6, Paragraph 1 of the Protection Act, 'The applicant for any intellectual creation shall provide a written application, a specification, necessary graphics, images and related documents or provide audio-visual creations in order to apply for registration with the competent authority.' Moreover, the required contents of the written application are regulated in Article 11 of Regulations Governing TCEs:

> The application form shall include… (3) The content of the applied TCE, including: **a.** its characteristics and the range of TCE, **b.** its historical meaning, method of use, and future development, and **c.** its relation to the tribe's society and culture, including identities, customs and taboos, and **d.** its secrecy, if applicable.

Therefore, in order to prepare the application form, field work, interviews and collection of historical documents are needed. The results of these filed works will become the evidence to persuade the reviewers of the application that the application form has fulfilled the requirement of Regulations Governing TCEs.

We are back to *Pakedavai*'s experience of preparation for the application again. It is noticeable that the division of labour in the application process was implemented roughly based on the traditional roles of the *Pakedavai* family members. The traditional leader's wife was the program manager of the application project. Three daughters of the ninth generation of *Vusam* (the traditional leader) were also deeply involved in this project. The

second and the third daughter were the counsels of this project, and the youngest daughter was the interpreter into and from the tribe's language and Mandarin in their field work.[21]

Among five subject matters[22] they decided to register, projects (1), (2) and (4) had been researched by the third daughter of the ninth generation of *Vusam* (the traditional leader), Mei-fang Bao, in her master's thesis *'Mythical of Pakedavai—The Conversation between Zepulj and Bead of Rainbow'*,[23] so the analysis and evidence of cultural meanings which *Pakedavai* planned to submit were based on her thesis. However, projects (3) and (5) required the collection of *Pakedavai*'s oral history. In addition to interviewing sixteen elders in the tribe, the members of project held several tribal meetings to clarify conflicts of different elders' memories and descriptions.[24]

As a noble family losing its traditional political power, *Pakedavai* tries to record and preserve its withering traditional authority, and to secure the community's original cultural discourse by means of gathering family members and collecting the elders' and the family members' memories. These achievements are exactly *Pakedavai*'s primary

[21] Chiu, Pakedavai Zepulj and Dabiliyan Ahlifu (n 1) 12.

[22] As mentioned in the previous section, they decided to apply (1) the architecture of the traditional leader's slate house (in Paiwan language: *inacilai a uma ni Pakedjavai*), (2) the lyrics of Pakedavai's 'family song'(*parutavak ni Pakedjavai*), (3) the procedure of *Pakedavai*'s millet-harvest ceremony (*ni Pakedjavai a sipalisian*), (4) the design and the legend of glass beads in the traditional leader's long necklace (*ni Pakedjavai a sauzayan a qatja*), and (5) the lyrics of the warrior's musical dance in the Tjaravacalj tribe (*Zian nuase Tjaravacalj*).

[23] Bao (n 12).

[24] Chiu, Pakedavai Zepulj and Dabiliyan Ahlifu (n 1) 17.

purpose to register their TCEs.[25] They regarded registration as the first step to challenge the unbalanced power relations inscribed in the production of colonial archives and knowledge. The unbalanced power relationships are similar to what Spivak criticises: indigenous people, as native informants, could only provide data, but they were be read and interpreted by the 'knowing subject' outside the tribe.[26] During the process of surveying the tribe's tradition in order to register TCEs, indigenous people play the roles of native informants, the ethnographer, and the knowing subject simultaneously.

In her interview, a *Pakedavai* elder said after finishing the family song's recording in front of the camera, 'Today is my happiest day. Even if I died right now, my life would be worthy, because I have completed my responsibility that my ancestors assigned to me.'[27] Ying-Tsui Chiu, Kakedavai Zepulj and Dabiliyan Ahlifu contend that 'the Protection Act and registration system provide a pathway for *Pakedavai* to recover their power of interpreting their own culture.'[28]

6.4 Voting for the Representative

According to Article 6, Paragraph 2 of the Protection Act, the representative is necessary in the application: 'The applicant…is limited to indigenous tribes or indigenous people and a representative shall be elected to take care of all matters arising. The regulations of electing representatives shall be determined by the competent authority.'

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[25] ibid 33.

[26] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press 1999) 49.

[27] Chiu, Pakedavai Zepulj and Dabiliyan Ahlifu (n 1) 37.

[28] ibid 33.

Therefore, the Council of Indigenous Peoples promulgated the regulations of electing representatives, which were prescribed in Article 3 of Regulations Governing TCEs, 'the representative of the application shall be an indigenous person and a member of the tribe/people who file such application. The representative shall be appointed in accordance with the social structure and local customs of the tribe/people. '

According to these two articles, although the applicant of registering TCEs is the indigenous group (i.e., indigenous tribes or peoples), the group shall elect a representative to proceed with the application. As mentioned above, the Protection Act holds a more flexible attitude towards tribal formations of their consensus. Therefore, indigenous peoples can follow their traditional decision-making process to elect their representatives, and the possible models of elections we have observed are informal group meetings, the meeting of the elders, and formal tribal meeting.[29]

Observing recent applications, it is clear that the elected representatives are from diverse backgrounds. For example, the *Thao* people relied on the elders meeting to select the chairman of the community development association as their representative of registration. The *Fata'an* tribe of the *Amis* people elected a host of the local guest house as representative, thanks to their traditional leader's support.[30] The *Bakedavai* family

[29] The observations are based on the report in the public training course of the Project Office of the Promotion of the Protection Act dated February 1, 2016.

[30] These cases were reported in Ying-Tsui Chiu's speech in a public training course dated February 1, 2016.

directly followed their customs and chose their *Vusam* (traditional leader) as its representative. The observers describe the election of the representative of *Bakedavai*: in a consensus meeting, an elder suggests, '*Lauchu* is the leader of our family, so it is appropriate that he becomes the representative in charge of the application and registration.' Another elder agreed immediately, 'It is for sure that he is the representative, because he is the head of *Pakedavai*.'[31] The representative was smoothly elected in a short time. Under the Protection Act, the representative is not appointed by the colonial power; the power to elect the representative returns to indigenous peoples.

Of course, the representatives cannot be always smoothly elected. For example, the *Tao* people on Orchid Island[32] hesitated to register their traditional kayat '*tatala'* for a long time. According to *Sinan Mavivo*, who is the member of the *Tao* people, the reason for the Tao's hesitation is that the *Tao* consists of different families and tribes and 'no one supposes that he or she can be the representative of the *Tao* people as a whole.'[33] According to observations of anthropological research, the *Tao*'s individualism and collectivism competes in Tao's everyday life.[34] It needs more negotiations within the levels of individuals, families and tribes for claiming the collective right of *tatala* under

[31] Chiu, Pakedavai Zepulj and Dabiliyan Ahlifu (n 1) 15, note 31.

[32] The original name of Orchid Island is *Ponso no Tao,* which is in the *Tao* language*.* Currently most Taiwanese call it "Lanyu" (蘭嶼). In the English maps, it is often marked as Orchid Island or Koto Island.

[33] TITV, *Taiwan Indigenous Perspectives Episode 159: How Do We Protect Indigenous Peoples' Traditional Cultural Expressions? (部落大小聲(159)蘭嶼拼板舟專利爭議—原住民族傳統智慧如何保護？)* (2017) <https://www.youtube.com/watch?v=t342d_OBAqY> accessed 30 March 2017.

[34] Yu-Chian Huang, 'Exchange and Individualism: A Case Study at Ivalino, Lan-Yu (「交換」與「個人主義」：蘭嶼野銀聚落的例子)' (National Taiwan University 2005) 11–13.

the Protection Act and of the representative elected for managing registration. Moreover, six tribes (*Yayo, Iraraley, Iranmeylek, Ivalino, Imowzod,* and *Iratey*) on Orchid Island have obvious social and geographical boundaries, although they belong to one *Tao* people. Except for marriage migration, a tribal member rarely moves to another tribe.[35] It will be very hard for them to elect the representatives who can speak for the interests of the *Tao* people as a whole. As mentioned above, the *Seediq* people, consisting of three linguistic groups, also face the same problem, so in the process of seeking consensus, they tried to arrange three representatives, because the Protection Act does not limit the number of representatives.

The use of representatives recognised by the Protection Act is a way to avoid the complicated rules of the tribal meetings enforced by the government and the recognition of tribes. The representative is the individual who is the contact person and represents the interests of the tribe and the indigenous people, so the legal status of indigenous tribe and family will not be the issue for the Protection Act, since the legal status of representative is no doubt the legal subject to file the application. It was also the way when the tribe had not been regarded as a legal person; the representative was an institution which pushed the Protection Act being enforced before recognising the tribe's qualification as a legal person in the state's law.[36]

[35] ibid 12.

[36] The Protection Act had been made in 2005, but the tribe's status of the legal person was recognised in 2015 by the revision of the Indigenous Peoples Basic Law, in which Article 2.1 prescribes, 'In order to promote independent development of indigenous tribe at its will, the tribe should establish the Tribal Council. The tribe which ratified by the central authority in charge of indigenous affairs shall be considered as public juristic person.'

Based on the functions mentioned above, the representative seems necessary in the registration system. Spivak argues that the institution of representatives may not be cancelled immediately when the tribe's resources is still scarce, though she continues by criticising how the colonial power and the appointed representative may prevent the subaltern from speaking out.[37] According to the Protection Act, indigenous tribes use the tribal meeting in which the government's regulation is not applied and follow their customs and economic and cultural consideration to decide who can represent their interests. We have found the variety of the representatives in the applications of registration of TCEs: the host of the guest house, the chairman of the People Assembly, the elders and the traditional leader, as mentioned in this Section.

Table 2 lists the applications that have been filed by indigenous tribes or peoples before March 18, 2017. These applications have completed the process of application introduced in this Section, including formation of tribal consensus, determination of subject matters, field works and interviews, and election of representatives.[38] Except for seven cases approved by the Council of Indigenous Peoples in October 2017,[39] four applications

[37] See the discussion in Section 3.5.2 and Chun-Mei Chuang, *The Postcolonial Cyborg: A Critical Reading of Donna Haraway and Gayatri Spivak* (Socio Publishing 2016) 158.

[38] Project Office of the Promotion of the Protection Act, 'The Website for the Protection of Indigenous People's Traditional Cultural Expressions (原住民族傳統智慧創作保護資訊網)' <http://ctm-indigenous.vm.nthu.edu.tw/about-database/indigenous-items> accessed 29 March 2017.

[39] In October 25, 2017, seven cases were approved and were granted the exclusive rights to the seven applicants, including (1) Fata'an Male Traditional Clothing: Five-piece Tassel Skirt (o fohkar no kapah i piilisinanno niyaro' no Fata'an): the holder is the Fata'an tribe, (2) traditional leader's ceremonial top hat (o Pakowawan no Fata'an Sapalengaw): the holder is the Fata'an tribe, (3) traditional fishing techniques (Palakaw): the holder is the Fata'an tribe,(4) ceremonial song (tohpxngx): the holder is the Tfuya tribe, (5) Tfuya's traditional clothing (y~~u~~s~~u~~ no cou ta tfuya): the

approved in April 2018,[40] and eight applications approved in July 2018,[41] more than one hundred applications are waiting for the Council of Indigenous Peoples' approval of registration. These applications show the amazing diversity of Taiwanese indigenous peoples' TCEs. They also show Taiwanese indigenous peoples' willingness to register their culture in the government's archives, especially compared to the registers in Panama, for which only eight applications were received from 2000 to 2008.[42] Taiwanese indigenous peoples' interactions with the registration system will be explored in next chapter to explain their diverse applications.

Applicants	**Subject Matters**	**Genres**
Thao People	Ceremony of White Eels and its Offerings, White Eel Shaped Mochi *(Thau wa tuza wa qmu tu kazakazash)*	Religious ceremonies, music, songs, sculptures, weaving, patterns, and clothing.
Thao People	Traditional Weaving Patterns (*Thau wa inlungkakaylash tu kazakazash)*	Sculptures, weaving, patterns, clothing, folk crafts and any

holder is the Tfuya tribe, (6) traditional House (sapah cbiyaw/sapah cbeyo/sapah sbiyaw): the holder is the Seediq people, (7) pestle-pounding music and performance, including ceremonial music (Mashtatun), non-ceremonial music and folksong (Izakua) and the long pestle (taturtur): the holder is the Thao people.

[40] In April 2018, four applications of the *Kiwit* tribe were approved, including (1) Clothing of youth class *'Ciopihay'*, (2) *Pawali* (Songs and Dance of *Ciopihay*), (3) *Ci Sera a ci Nakaw* (Song of Kiwit Tribe's Legend) and (4) *Kahahayan* (Song of Sending Spirits Away).

[41] In July 2018, two applications of the *Kanakanavu* people and six worships songs of the *Seediq* people were approved. Kanakanavu's applications are (1) *Kanakanavu*'s ceremony (*Mikong*) and (2) Kanakanavu's traditional costume (*tamna tikuru*). Six worship songs of the *Seediq* People include (1) *Ekaibe*, (2)*Siyo Siyo Sii / Siyo Siyo Siey / Siyo Siyo Sii*,(3) *Ohnay* (4) *Oyos Na Oyos* (5) *Yonodoni Ta Da/Ndutudi Ta Da/Endtuji Ta Da* and (6) *O Bale/o Balay/o Balay*.

[42] Anna Friederike Busch, *Protection of Traditional Cultural Expressions in Latin America: A Legal and Anthropological Study* (Springer 2015) 289, note 61.

Applicants	Subject Matters	Genres
		other expression of the cultural achievements.
Thao People	Pestle-Pounding Music and Performance, including ceremonial music (*Mashtatun),* non-ceremonial music and folksong (*Izakua*) and the long pestle (taturtur)	Religious ceremonies, music, songs, sculptures, weaving, patterns and clothing.
Thao People	Thao's Legend of Owls and its cultural meaning *(Shmadia)*	Sculptures, weaving, patterns, clothing, folk crafts and any other expression of the cultural achievements .
Thao People	Thao's Legend of Chasing White Deer *(inkahiwan qmaqutilh mapuzipuzi a lhkaribush a qnuan a lalawa)*	Any other expression of the cultural achievements.
Thao People	Thao's Legend of Chasing White Deer *(sqmaqutilh mapuzipuzi a lhkaribush a qnuan a lalawa)*	Any other expression of the cultural achievements.
Thao People	Traditional Male Clothing	Clothing.
SaySiyat People	SaySiyat's Ceremony "*paSta'ay"*	Religious ceremonies.
SaySiyat People	Seventeen Worship Songs of *paSta'ay*	Religious ceremonies and songs.
SaySiyat People	Hip Bells	Religious ceremonies and any other expression of the cultural achievements .
SaySiyat People	Ceremonial Flags	Religious ceremonies and any other expression of the cultural achievements .

Applicants	Subject Matters	Genres
SaySiyat People	Flags of Ten-Year Ceremony	Religious ceremonies and any other expression of the cultural achievements.
SaySiyat People	Snake-Shaped Wig	Religious ceremonies and any other expression of the cultural achievements.
SaySiyat People	Saysiyat's Ritual *'oemowaz ka kawaS'*	Religious ceremonies.
SaySiyat People	Shell Jewellery: Offering and Reconciliation	Religious ceremonies and any other expression of the cultural achievements.
SaySiyat People	Bamboo Divination	Religious ceremonies.
SaySiyat People	Blessing of Growth	Religious ceremonies.
SaySiyat People	Weaving Pattern :'Deity of Thunder'	Patterns.
SaySiyat People	Weaving Pattern: Sun	Patterns.
Seediq People	Worship Song *'e ka-ibe'*	Songs.
Seediq People	Worship Song *'Siyo siyo si'*	Songs.
Seediq People	Worship Song *'Ohnay'*	Songs.
Seediq People	Traditional House	Any other expression of the cultural achievements.
Seediq People	Traditional Weaving Patterns: *pala pniri/pala pniri（pala qnapan）/pala kskus*	Weaving.
Seediq People	Traditional Weaving Patterns: *pacang ratu /capang ratu/qabang ratu*	Weaving.

Applicants	Subject Matters	Genres
Seediq People	Traditional Weaving Patterns: *pala pungu*	Weaving.
Seediq People	Traditional Weaving Patterns (4): *pala bale(paru) /pala paru/pala balay(paru)*	Weaving.
Seediq People	Dance Song *(O-yo-s-na-o-yo-s)*	Songs.
Seediq People	Dance Song *(Yo-no-to-ni-ta da)*	Songs.
Seediq People	Ceremonial Song *(O-ba-le-wa)*	Songs.
Seediq People	The Name of *Seediq* People: *Seediq / Sediq / Seejiq and Seediq Bale / Sediq Balay / Seejiq Balay*	Any other expression of the cultural achievements.
Seediq People	Traditional Weaving Patterns: *pala pnqapah(pnaha) /pala psaan/pala sla)*	Weaving.
Seediq People	Traditional Weaving Patterns: *pala(pacang) doriq / pala(capang) doriq / pala(pacang) doriq*	Weaving.
Seediq People	Patterns: *snuru/cnuru/ snuru*	Patterns.
Atayal People	Short Robe with Long Sleeves *(Ratang na Melihang)*	Clothing.
Atayal People	Long Robe with Long Sleeves, or Bridal Robe *(Melihang)*	Clothing.
Tamazuan Tribe of Bunun People	Wooden Calendar	Folk crafts.
Tamazuan Tribe of Bunun People	The Priest's Long Gown *(hulus maun)*	Clothing.
Islituan ・ Binkinuan Family	Shamanic Ceremony *(Islituan ・ Binkinuan Lapaspas)*	Religious ceremonies.

Applicants	Subject Matters	Genres
of *Isi Bukun* Clan of *Bunun* People		
Islituan ・ Binkinuan Family of *Isi Bukun* Clan of *Bunun* People	Songs of Shamanic Ceremony *(Islituan ・Binkinuan Lapaspas)*	Songs.
Islituan ・ Binkinuan Family of *Isi Bukun* Clan of *Bunun* People	Ritual of Blessing New-born Babies *(Lusan Uvaz)*.	Religious ceremonies.
Islituan ・ Binkinuan Family of *Isi Bukun* Clan of *Bunun* People	Necklace used in the Ritual of Blessing New-born Babies *(Lusan Uvaz)*	Religious ceremonies and any other expression of the cultural achievements.
Tfuya tribe of Tsou People	Ceremony *(meesi no ton'u)*	Religious ceremonies.
Tfuya tribe of Tsou People	Ceremonial song *'tohpxngx'*	Songs.
Tfuya tribe of Tsou People	Man's House *'Kuba'*	Any other expression of the cultural achievements.
Tfuya tribe of Tsou People	Sacred Barn *(emoo no peisia)*	Any other expression of the cultural achievements.
Tfuya tribe of Tsou People	Tfuya's Traditional Clothing (y~~usu~~ no cou ta tfuya)	Clothing.
Tfuya tribe of Tsou People	Tfuta Tunes *(iyahe 、miome 、peyasvi no poha´o)*	Songs.
Tfuya tribe of Tsou People	Worship Song (peyasvi no *poha´o*)	Songs.
Tfuya tribe of Tsou People	Tfuya's Traditional Accessories	Clothing.

Applicants	Subject Matters	Genres
Tfuya tribe of Tsou People	Ceremony of War *(meesi no mayasvi)*	Religious ceremonies.
Tfuya tribe of Tsou People	Worship Song *(ehoi)*	Songs.
Tfuya tribe of Tsou People	Worship Song *(eao)*	Songs.
Tfuya tribe of Tsou People	Tfuta Tunes *(iyahe)*	Songs.
Tfuya tribe of Tsou People	Legends of Water flood, *Hamo* (Tsou's God), and *Nivnu* (Tsou's Goddess)	Any other expression of the cultural achievements.
Tfuya tribe of Tsou People	*euvuvu*	Any other expression of the cultural achievements.
Tfuya tribe of Tsou People	*pobakx*	Any other expression of the cultural achievements.
Tfuya tribe of Tsou People	*yanosuyu*	Any other expression of the cultural achievements.
Hla'alua People	Ceremony of the Sacred Shells of Hla'alua: Preparing Songs (*Miatungusu: malalalangu*)	Songs.
Hla'alua People	Worship Song, Ceremony of the Sacred Shells of Hla'alua *(lualikihli)*	Songs.
Hla'alua People	Dance Song, Ceremony of the Sacred Shells of Hla'alua *(mitungusu)*	Songs.
Kanakanavu People	Traditional Ceremony *(Mikong*)	Religious ceremonies.
Kanakanavu People	Traditional Theme *(Pe'uuna)*	Songs.

Applicants	Subject Matters	Genres
Kanakanavu People	Traditional Clothing *(tikuru ningasu*)	Clothing.
Kucapungane tribe of Rukai People	Kucapungane Tribe's Totem *(kucapungane-pinasu lhikulavane)*	Patterns.
Kucapungane tribe of Rukai People	Ceremony of Granting Lilies: *Kiyalidrau(for women) Siyabengelhai(for men)*	Religious ceremonies.
Kucapungane tribe of Rukai People	Kucapungane Tribe's Folksong *(Sidrumane ka Senai ki Sukucapungane)*	Songs.
Taromak Tribe of Rukai People	Swing *(talraisi)*	folk crafts and any other expression of the cultural achievements.
Taromak Tribe of Rukai People	Institution of Tribal Youth	Any other expression of the cultural achievements.
Taromak Tribe of Rukai People	Hip Bells *(dawding)*	Sculptures, patterns, folk crafts and any other expression of the cultural achievements.
Taromak Tribe of Rukai People	Folksong 'Praising Taromak' *(aingarongo)*	Songs.
Taromak Tribe of Rukai People	Taromak's Folksong *'oniyo'*	Songs.
Taromak Tribe of Rukai People	Taromak's Guarding God, *takeakeala*	Sculptures, patterns, and any other expression of the cultural achievements.
Kaviyangan Tribe of Paiwan People	Double-Sided Craved Stone Pole	Sculptures and patterns.
Kaviyangan Tribe of Paiwan People	Five-year Ceremony *(Maljeveq)*	Religious ceremonies.

Applicants	Subject Matters	Genres
Kaviyangan Tribe of Paiwan People	Main Pole of *Zingrur* Family House *(kaumaqan a cukes i kaviyangan ni zingrur ti mulitan)*	Sculptures and patterns.
Kaviyangan Tribe of Paiwan People	Side Pole of *Zingrur* Family House *(kaumaqan a pararulj i kaviyangan ni zingrur ti muakai)*	Sculptures and patterns.
Pakedavai family of Paiwan People	Architecture of Traditional Leader's Slate House (*inacilai a uma ni Pakedjavai*)	Any other expression of the cultural achievements.
Pakedavai family of Paiwan People	Lyrics of *Pakedavai*'s 'family song' (*parutavak ni Pakedjavai*)	Songs.
Pakedavai family of Paiwan People	Procedure of *Pakedava*i's Millet-Harvest Ceremony (*ni Pakedjavai a sipalisian*)	Religious ceremonies.
Pakedavai family of Paiwan People	Design and Legend of Glass Beads in Traditional Leader's Long Necklace (*ni Pakedjavai a sauzayan a qatja*)	Patterns and any other expression of the cultural achievements.
Pakedavai family of Paiwan People	Lyricis of *Tjaravacalj* Warriors' Musical Dance (*Zian nuase Tjaravacalj*)	Dance.
Kavalan People	The Name of *Kavalan* People	Any other expression of the cultural achievements.
Kavalan People	Kavalan's Pattern of Wood Carving *(temiqal)*	Sculptures and patterns.
Kavalan People	Banana Weaving Handcraft *(tenun)*	Weaving, patterns, clothing and folk crafts.
Kavalan People	Musical Dance in Healing Rituals: (*kisaiz*)	Religious ceremonies.

Applicants	Subject Matters	Genres
Kavalan People	Canoe *(tuqk bawa)*	Folk crafts and any other expression of the cultural achievements.
Kavalan People	Ceremonial Skirts *(Raqumn)*	Clothing and patterns.
Tafalong Tribe of Amis People	Ceremony of Lovers' Night *(milidofot)*	Songs, dance and music.
Tafalong Tribe of Amis People	Legend of Two Brothers *(Mayaw kakalawa、unak kakalawa)*	Songs, dance and music.
Tafalong Tribe of Amis People	Ceremony of Greeting Ancestral Spirits	Songs, dance and music.
Tafalong Tribe of Amis People	Worship Songs of Annual Ceremony (O Radiw no ilisin)	Songs.
Fata'an Tribe of Amis People	Fata'an Male Traditional Clothing: Five-piece Tassel Skirt *(o fohkar no kapah i piilisinanno niyaro' no Fata'an)*	Clothing.
Fata'an Tribe of Amis People	Traditional Leader's Ceremonial Top Hat *(o Pakowawan no Fata'an Sapalengaw)*	Clothing.
Fata'an Tribe of Amis People	Traditional Fishing Techniques *(Palakaw)*	Folk crafts
Kalala Tribe of Amis People	*Kalala*'s Annual Ceremony: Suite of Limorak *(ilisin：limorak)*	Songs.
Kalala Tribe of Amis People	*Kalala*'s Annual Ceremony: Song of Worshipping Ancestral Spirits *(ilisin：malitapod)*	Songs.
Kalala Tribe of Amis People	*Kalala*'s Annucal Ceremony: Drinking Song of *Miki'epah (ilisin：miki'epah)*	Songs.

Applicants	Subject Matters	Genres
Kalala Tribe of Amis People	*Kalala*'s Rain Ceremony and Songs *(pakaolad)*	Religious ceremonies and songs.
Kalala Tribe of Amis People	Kalala's Sun Ceremony *(pakacidal)*	Religious ceremonies.
Kalala Tribe of Amis People	Ceremony of Expelling Evil Spirits *'salifong'*	Religious ceremonies.
Kalala Tribe of Amis People	Song of Annual Ceremony *'pakiting'*	Religious ceremonies.
Kalala Tribe of Amis People	Song of Annual Ceremony *'safaniw'*	Religious ceremonies.
Kalala Tribe of Amis People	Song of Annual Ceremony *'pililafang'*	Religious ceremonies.
Kalala Tribe of Amis People	Song of Annual Ceremony *'mikomod'*	Religious ceremonies.
Kiwit Tribe of Amis People	Clothing of youth class *Ciopihay*	Clothing.
Kiwit Tribe of Amis People	Dance of *Ciopihay* (*Pawali*)	Dance.
Kiwit Tribe of Amis People	Song *(Pawali)*	Songs.
Kiwit Tribe of Amis People	Song of *Kiwit* Tribe's Legend (*Ci Sera a ci Nakaw)*	Songs.
Kiwit Tribe of Amis People	Song of Sending Spirits Away *(Kahahayan)*	Songs.
Malan Tribe of Amis People	Malan Tribe's Drinking Song	Songs.
Malan Tribe of Amis People	Malan Tribe's Youth Song	Songs.

Applicants	Subject Matters	Genres
Pinaski Tribe of Puyuma Tribe	Women's Weeding Ritual *(misa'ur)*	Religious ceremonies, songs and dance.
Pinaski Tribe of Puyuma Tribe	Ritual after Women Complete Weeding *(muhamut)*	Religious ceremonies, songs and dance.
Ulivelivek Tribe of Puyuma People	Swing	Folk crafts and any other expression of the cultural achievements.
Ulivelivek Tribe of Puyuma People	*Sizung*	Any other expression of the cultural achievements.
Tawsay Tribe of Seediq People	Traditional Woman Clothing	Clothing.
Tawsay Tribe of Seediq People	Traditional Rattan Weaving *(tokan rawa)*	Weaving and folk crafts.
Tawsay Tribe of Seediq People	Weaving Patterns *(doriq)*	Patterns.
Tawsay Tribe of Seediq People	Weaving Patterns	Patterns.
Tawsay Tribe of Seediq People	Shaman *(msapuh)*/Ancestor Belief *(pngaya utux rudan)*	Religious ceremonies.
Tawsay Tribe of Seediq People	Wooden or Bamboo Earrings *(brikug)*/ Accessories *(qnqaya brikug)*	Folk craft.
Tawsay Tribe of Seediq People	Earrings *(brikug)*/ Sculptures *(Snalu)*	Sculptures.
Truku People	Weaving Pattern '*Dowriq Utux Rudan'*	Weaving, patterns, clothing and folk crafts.
Truku People	Weaving Pattern *'Dowirq kuyuh Truku'*	Weaving, patterns, clothing and folk crafts.

Applicants	Subject Matters	Genres
Truku People	Weaving Pattern '*Dowirq snaw Truku'*	Weaving, patterns, clothing and folk crafts.
Truku People	Weaving Pattern *'Dowriq Sisil'*	Weaving, patterns, clothing and folk crafts.
Truku People	Weaving Pattern '*Dowriq purung'*	Weaving, patterns, clothing and folk crafts
Paiwan People	*Tcimo* Traditional Clothing	Clothing.
Paiwan People	*Tcimo*'s Legend	Any other expression of the cultural achievements.
Sakizaya People	*Sakizaya* Women's Clothing	Clothing.
Sakizaya People	*Sakizaya* Men's Clothing	Clothing.
Sakizaya People	Sakizaya's Totem	Patterns.
Sakizaya People	Ceremony of God of Fire	Religious ceremonies.
Tao People	The structure of Tao's Canoe *(avavang)*	Patterns and folk crafts.
Tao People	Traditional Clothing *(ayob no TAO)*	Weaving, clothing, folk crafts and any other expression of the cultural achievements.
Tao People	Carved Boat Launching Ceremony *(mapabehes)*	Religious ceremonies and any other expression of the cultural achievements.
Tao People	Totem of Carving *(vatek)*	Patterns, folk crafts, and any other expression of the cultural achievements.

Table 2: The details of 120 Applications filed from 2015 to June 2018, including applicants, subject matters and genres.[43] Translated by the author.

[43] The table of applications is organised from the government's public information, The Council of Indigenous Peoples, '2017 Project of Protection of Indigenous Peoples' TCEs (Number:

6.5 Moving on

Responding to the shadow of colonialism performed in the relationship between the state and indigenous peoples analysed in Chapter 3, this chapter use *Pakedavai* as a prime example on which to base an examination of indigenous peoples' preparation for registration. Although the Protection Act requires that the applicant should be officially recognised indigenous people or indigenous tribe, the *Pakedavai* family, as an indigenous group without being officially named, claims their sole ownership of their applied TCE. It is a bottom-up resistance to the official naming of indigenous peoples (see Section 3.1) and the governmental recognition of an indigenous tribe (see Section 3.2). When deciding their subject matter and choosing their representatives, indigenous peoples also enjoy some flexibility. The Protection Act chooses not to require a formal tribal meeting, which would have to follow the governmental regulations described in Section 3.3, so the applicants can follow their custom to rebuild their traditional decision-making platform and reach their consensus. Customary law in the process of registration will be enforced by indigenous peoples' choice and actions, rather than by the government's codification (see Section 3.4). The requirement of a representative, which is under the colonial shadow as described in Section 3.5, is unavoidable in this stage, but the Protection Act tries to minimise its requirement and respect tribal customs, so Article 3 of Regulations Governing TCEs requires that the representative shall be an indigenous member of the

106051) (106 年度推動原住民族傳統智慧創作保護計畫勞務採購案服務建議書徵求說明, 案號:106051)'
<https://www.apc.gov.tw/portal/getfile?source=2D838540F5D6F659FAFB9859EF31AC3B381A272F479D65D98D902DFAAFC2E154EF7CA0D1E3965A31EBAADEC3F705B463A840A4B2052FB1FC680B5E6332DDDAA1&filename=40B2509AE52573D09F77B2EE49C258D2DE2D6BCE1D404D83.>.

tribe/people who files such application and shall be appointed in accordance with the applicant's local customs.

After indigenous peoples finish their preparation process for registration, how do they cope with the centralised registration system? Chapter 7 will further explore their oral tradition as hybrid and in-between (see Section 7.1) and how they respond to the decline of oral tradition (see Section 7.2.1) and build a site of memory in the state's registration (see Sections 7.2.2 and 7.3). Finally, through observing documentation and registration, the binary distinction in the conventional view of TCEs, such as the distinction between TCE's preservation and IP protection and between TCE's customary and non-customary use, will be challenged (see Section 7.4).

7 Responding to the Colonial Shadow of Registration

According to the Protection Act, in order to obtain the exclusive right to use their TCEs, a tribe should file its application and get approval from the government.[1] In addition, TCEs will be transformed into documents and archives in the centralised official registry in order to be registered as exclusive legal rights.

As noted in Section 4.1, Sherman and Bently suggest three important characteristics of modern registration of IP. These characteristics may also impact indigenous peoples' culture when the tribes are required to deal with the modern registry: Firstly, the modern registration system means the process of centralisation is taking place.[2] Secondly, by modern registries, the creation was represented in pictorial or written terms rather than via a copy or a model.[3] The standardisation of verbal and visual formulae produced 'a shift from memory-based to print-based methods.'[4] Finally, the modern registration impels our negligence of registration: we tend to see registration as an area of 'little

[1] As Article 6 of the Protection Act prescribes, 'the applicant for any TCE shall provide a written application, a specification, necessary graphics, images and related documents or provide audio-visual creations in order to apply for registration with the competent authority.' Article 7, Paragraph 1: '…starting from the date of registration, the applicant shall obtain the exclusive right to use such TCE.'

[2] Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge University Press 1999) 70–71.

[3] ibid 72.

[4] ibid.

conceptual interest, involving only the complex but routine bureaucratic game of paper shuffling'[5].

On the other hand, as mentioned in Section 4.2, some postcolonialists worry that the modern government's documentation and production of new knowledge will enforce the coloniser's gaze. Under the guise of protecting 'tradition', the state may produce more official archives and establish its self-image by emphasising that indigenous people are original, traditional, and the 'other'.

In the following sections of this Chapter, I analyse how Taiwan's indigenous peoples react to the Protection Act and its criticism, such as centralisation of information, TCE's representation by written or digital document, bureaucratic registration, and the danger of the coloniser's gaze. Section 7.1 introduces characteristics of Taiwanese indigenous peoples' oral tradition and respond to Benjamin's idea of storyteller. Section 7.2 reviews how the Taiwanese indigenous tribes currently deal with their intangible memory by using Pierre Nora's idea of *lieux de mémoire* (sites of memory). The centralisation of information will be disturbed by indigenous peoples' diverse sites of memory. Section 7.3 analyses seven applications approved by the Council of Indigenous Peoples. The observations focus on how indigenous peoples meet the requirement of the Protection Act but still attempt to maintain their oral and multi-version tradition. Applicants balance the memory-base and the print-base, rather than replace one with the other, by transforming the progress of registration into 'a site of memory'. Section 7.4 suggests that

[5] ibid.

indigenous peoples' documentation and registration are beyond WIPO's binary distinctions between preservation and IP protection of TCEs (see Section 7.4.1) and between customary and non-customary use of TCEs (see Section 7.4.2).

7.1 Characteristics of Taiwanese Indigenous Peoples' Oral tradition

Among 120 applications filed before 2018 according to the Protection Act (see Table 2 in the previous chapter), seven cases are explicitly to register oral 'legends': (1) *Thao*'s Legend of Owls and its cultural meaning *(Shmadia),* (2) *Thao*'s Legend of Chasing White Deer *(inkahiwan qmaqutilh mapuzipuzi a lhkaribush a qnuan a lalawa),* (3) Legends of Water flood, *Hamo* (Tsou's God), and *Nivnu* (Tsou's Goddess), (4) Design and Legend of Glass Beads in Traditional Leader's Long Necklace (*ni Pakedjavai a sauzayan a qatja*), (5) Legend of Two Brothers *(Mayaw kakalawa、unak kakalawa),* (6) Song of *Kiwit* Tribe's Legend (*Ci Sera a ci Nakaw)* and (7) *Tcimo*'s Legend.

In addition, most worship songs in the applications are relevant to indigenous peoples' origin, legends, law, and history,[6] such as the lyrics of *Pakedavai*'s family song (*parutavak ni Pakedjavai*), the *Tfuya* tribe's song of history (*tohpxnpx*), the song of worshipping ancestral spirits in the *Kalala* tribe's annual ceremony, the worship song in the ceremony of the Sacred Shells of *Hla'alua*, and the worship songs of *paSta'ay.* For people without a writing system, repetitions in everyday life, in small rituals and in sacred ceremonies are a common method of distributing their knowledge.

[6] Paul Kuruk, 'Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States' (1999) 48 American University Law Review 769, 780.

These applied TCEs are part of oral history; they will be incomplete if they are regarded as merely songs or lyrics. For example, the lyrics of *Pakedavai*'s family song are not only the song lyrics, but also a great literature work and part of *Pakedavai*'s oral history.[7] The lyrics, sung in the ancient *Paiwan* language, describe the high status of *Pakedavai* and their noble power, treasure and territories. The songs can only be sung by *Pakefavai* family members in important gathering occasions.[8] Four sections of this family song are translated here to show the combination of their literature, culture and history.[9]

Please listen to the family song of Pakedavai!

With a sincere mood,

I will sing the Pakedavai's family song.

Pakedavai's wall is constructed by the pottery,

Pakedavai's undefeatable power is known to the world,

Her glory is to Lalaus!

…

This is Pakedavai's myth and legend:

A banyan tree in front of Pakedavai's house,

Was covered with pork livers, pig hearts, and precious shells.

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[7] Ying-Tsui Chiu, Pakedavai Zepulj and Dabiliyan Ahlifu, 'The Indigenous Traditional Intellectual Creations Protection Act and the Discourse of Cultural Identity: The Practice of the Pakedavai Family in Paiwan (「原住民族傳統智慧創作保護條例」與身分性文化敘述：排灣族巴格達外家族之實踐)' (2015) 8 Taiwan Journal of Indigenous Studies (台灣原住民族研究季刊) 1, 20.

[8] ibid 20–21.

[9] The original texts and the Chinese translation are recorded in ibid 22–23.

We picked up a banyan leaf,

Blew softly,

And a mulimulitan[10] *was born.*

In our harvest ceremony,

Bananas, taros, and millets are piled up as a mountain,

Abundant are they to block the river,

And the river has become a deep pond…

Pakedavai's family song demonstrates that TCEs are deeply rooted in the tribe's oral tradition. The song refers to the name of their God *Lalaus*, the sacred meaning of their family treasure, *Mulimulitan* (glass beads), and the family's wealth and social position. However, if TCEs are registered, it means that they have to be written in the government's documentation system. How do indigenous peoples deal with the transformation of oral tradition when myths and legends begin to be written down? In the following sections, Taiwanese indigenous peoples' oral tradition and the process of documenting their TCE will be analysed.

In Walter Benjamin's article *The Storyteller*,[11] the analysis of storytelling is surprisingly similar to Taiwanese indigenous peoples' own descriptions of their oral tradition. This section analyses the basic characteristics of Taiwanese indigenous peoples' oral tradition

[10] *Mulimulitan* means the glass beads owned by Pakedavai's family.

[11] Walter Benjamin, 'The Storyteller' in Hannah Arendt (ed), Harry Zohn (tr), *Illuminations* (Schocken Books 1986).

and also mentions Benjamin's idea of storytelling,[12] which can be a reference to understand indigenous peoples' oral tradition.

The 'storyteller' described by Benjamin is not a profession; it means a person who tells the events in the past. It does not matter if the stories are personal experience, or are heard from someone else. Benjamin contends that the storyteller has already become 'something remote':[13]

> Less and less frequently do we encounter people with the ability to tell a tale properly. More and more often there is embarrassment all around when the wish to hear a story is expressed. It is as if something that seemed inalienable to us, the securest among our possessions, were taken from us: the ability to exchange experiences. One reason for this phenomenon is obvious: experience has fallen in value.

As Western society gradually strengthened its faith in science, it began to think of myths as unscientific or pre-historical. After the birth of printing technology, Western society has been far away from the tradition of epic. Personal experience has been supposed to be unreliable and has fallen in value. Gradually, indigenous peoples who 'remains to believe in myths and live with myths'[14] became unique.

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[12] Benjamin's 'story-telling' is a good way of understanding indigenous peoples' oral tradition. Storytelling is different from Bhabha's idea of 'narrative' or 'narration'. Bhabha's 'narrative' means 'the organisation of language into a structure which thereby conveys an account of events in a connected and ordered manner.' Bhabha has 'alluded to the relationship between narrative and issues of identity, principally in connection with the areas of nationalism and postcolonialism.' See: Andrew Edgar and Peter R Sedgwick, *Cultural Theory: The Key Concepts* (Routledge 2008) 219.

[13] Walter Benjamin (n 11) 83.

[14] Namoh Nofu Pacidal, 'What Is Tradition? (何謂傳統? 絕對創建的傳統恆性)' (March 2017) <https://www.facebook.com/notes/namoh-nofu-

There are no terms equal to 'myths' or 'legends' in Taiwanese indigenous peoples' languages. Moreover, most of these languages do not distinguish among myths, legends, and folk tales,[15] but different indigenous tribes have their own cultural meanings to understand and pass down their oral stories

For example, the *Bunun* people use *Palihavasan* to describe the way of telling 'the stories about the past *(havas)*', which covers myths, taboos, rules, stories, the ancestor's migration, and so on.[16] The researchers suggest that *Palihavasan* is a term between history and memory.[17] *Palihavasan* is hybridity: on the one hand, the *Bunun* people emphasise the examination of the stories' credibility through discussions. On the other hand, every person maintains an intimate and personal connection to their past.[18]

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pacidal/%E4%BD%95%E8%AC%82%E5%82%B3%E7%B5%B1-%E7%B5%95%E5%B0%8D%E5%89%B5%E5%BB%BA%E7%9A%84%E5%82%B3%E7%B5%B1%E6%81%86%E6%80%A7/1598767340136787/>. In this article, as an indigenous person, Namoh describes his view on the relationship between indigenous peoples and their myths.

[15] Da-Chuan Sun, 'The Beauty of Myths (神話之美)' (2016) 28 Literature of Indigenous Peoples (原住民族文獻) 4, 4.

[16] Shu-Yuan Yang, 'Between History and Memory: Dakuanshan Event and Beyond (歷史與記憶之間：從大關山事件談起)' (2003) 59 Humanitas Taiwanica (臺大文史哲學報) 31, 55; Ying-Kuei Huang, 'Time, History and Practice: The Example of Bunun of the Tungpu Tribe (時間、歷史與實踐：東埔社布農人的例子)', *Time, History and Memory (時間、歷史與記憶)* (1999) 436, 444–445.

[17] Yang (n 16) 55; Huang (n 16) 436, 444–445.

[18] Yang (n 16) 56.

The same idea about oral stories is found in many Taiwanese indigenous tribes. *Atayal* people have the same logic and call the method of telling stories '*ywaw raran*'. *Ywaw* refers to 'events', *raran* means 'a long time ago'. The *Paiwan* people's '*milimilingan'* is also a term referring to 'events which happened long time ago', including ancient stories, supernatural stories, and tales of spiritual persons; to distinguish them from ancient stories, they call recent stories *'tjautsiker'*.[19]

In addition, a story told by Taiwanese indigenous people is not only a story, but an action and a ritual which reveals the past. For example, the *Puyuma* tribe calls myths, legends and folk tales *tinu pa'ti Ta tomuamuan* (the ancestor's words) or *tinu pa'ti Ta ma'iTangan* (the elder's words). Before they tell these stories, they have to perform a ritual called *kianun nitia*, which means 'greetings to the ancestors':[20]

> The storyteller moistens his first finger with the wine, and sprays the wine in the air for three times. He announces the ancestors' names and prays to be allowed to tell the tribe's myths and legends under the ancestors' assistance… Only after this ritual can the speaker smoothly tell the story and be protected from misfortune or accidents.[21]

Therefore, only when we acknowledge characteristics of oral tradition of Taiwanese indigenous peoples can we understand the possible interaction between oral tradition

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[19] Chung-Cheng Pu, 'Functions and Characteristics of Taiwanese Indigenous Peoples' Myths and Legends (臺灣原住民族神話傳說凸顯的功能與特色)' (2016) 28 Literature of Indigenous Peoples (原住民族文獻) 12, 13.

[20] ibid.

[21] ibid.

and official registration. After reviewing the field documents which anthropologists have collected and analysed, I would like to focus on some characteristics of oral tradition: they are personal, multi-version, relevant to death, endless, fluid and interactive with audiences. All these characteristics correspond to TCE's image of hybridity and in-between.

(1) Personal and Multi-version

In the society of oral tradition, knowledge is always distributed from person to person, because there is no alternative way to distribute knowledge except via face-to-face communication. Since being spoken from a living person is the condition of indigenous knowledge, it is taken for granted that knowledge will exist in multiple versions. However, personal but multi-version knowledge system is always rejected by the 'civilised' world dominated by the Western science.

It is argued that oral history does not depend on writing skills, but on mouths and memory, so it can be accessible for all people. Personalised knowledge is not easily controlled or canonised, so it is possible to be more diverse. The story can keep being updated through indigenous peoples' changing historical mindsets.[22] Memory is flexible and hybrid, as

[22] Ming-Ke Wang, 'Primordial History: The Qiang People's Brother Stories (根基歷史：羌族的弟兄故事)' in Ying-Kuei Huang (ed), *Time, History and Memory (時間, 歷史與記憶)* (Institute of Ethnology, Academia Sinica 1999) 283–341.

Pierre Nora points out: 'Memory is by nature multiple and yet specific; collective, plural, and yet individual.'[23]

(2) Its Authority is Death

As emphasised above, indigenous peoples' history exists in the mouths of the speakers who are alive. However, death also plays an important part in the transmission of oral stories. As the *Tafalong* tribe describes the tribe's history, the authority of their oral tradition deeply depends on the death and the past:

> The group rooted in the oral tradition does not depend on the living individuals to maintain its existence, but deeply rely on the death and the past. Our priest always sings the sequence of our ancestors before the ritual, which is called 'Rayray'. 'Rayray' means the sequence, order, and context regarding the origin of the tribal history, and sometimes we extend the meaning of 'Rayray' as 'history'. By calling our ancestors' names, the eternality of the tribe's history has deeply been rooted in the community members' lives.[24]

Surprisingly, the *Tafalong*'s relationship between oral history and death is similar to Benjamin's observations on storytelling: 'Death is the sanction of everything that the storyteller can tell. He has borrowed his authority from death,'[25] and 'the idea of eternity

[23] Pierre Nora, 'Between Memory and History: Les Lieux de Mémoire' [1989] Representations 7, 9.

[24] Namoh Nofu Pacidal, 'Ka-Kita-an, Our Place: A Non-Tribalist Perspective (Ka-Kita-an 我們之處，非「部落主義」的我群觀)' (2017) 49 New Society For Taiwan 26, 26.

[25] Walter Benjamin (n 11) s XI.

has ever had its strongest source in death.'[26] Benjamin further elaborates how the authority of the storyteller comes from the death:

> It is, however, characteristic that not only a man's knowledge or wisdom, but above all his real life—and this is the stuff that stories are made of—first assumes transmissible form at the moment of his death. Just as a sequence of images is set in motion inside a man as his life comes to an end—unfolding the views of himself under which he has encountered himself without being aware of it—suddenly in his expressions and looks the unforgettable emerges and imparts to everything that concerned him that authority which even the poorest wretch in dying possesses for the living around him. This authority is at the very source of the story.[27]

It has been observed in many indigenous tribes that the elders have high authority, which is also relevant to the authority of death. The elders are respected in the tribe, not only because they are old and experienced, but also because they are the medium of life and death: they are something 'in-between'. As Namoh Nofu Pacidal argues, in the *Amis* language elders are called *'Matuasai'*, but ancestors are called *Matuasai* as well. For *Amis* people, *Amis* elders are the bridge between living people and ancestors, and they are close to the eternity. 'The body of the elder is the key of culture. Only following the elders can we enter the tribe's temporality.' [28] In the context of oral tradition, 'in-between' is more important than 'the end' itself, because it opens diverse possibilities to the tribe's temporality. It is constructing, changing, multi-version, but points to the tribe's common temporality, destiny and eternity.

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[26] ibid V.

[27] ibid.

[28] Namoh Nofu Pacidal (n 14).

(3) Endless

It is argued that Taiwanese indigenous peoples' concepts of time and history cannot be simply portrayed as either linear or cyclical history.[29] Every tribe in Taiwan may have different historical perspectives, but the common characteristics are a reasonable match for the observation mentioned above. After analysing *Atayal*'s *gaga*[30]stories, Kuo-Chao Huang argues that Atayal's historical mindset is neither linear nor cyclical history, but a repeating emphasis on their ethical relationship, which is the foundation for uniting their small society. The foundation allows the *Atayal* people to organise groups of labour and to share moral responsibility and the division of labour. The *gaga* stories show a historical mindset based on interpersonal affection.[31]

Memory creating endless stories is well described by Benjamin:

> Memory creates the chain of tradition which passes a happening on from generation to generation. It is the Muse-derived element of the epic art in a broader sense and encompasses its varieties. In the first place among these is the one practiced by the

[29] Wang (n 22) 284. He argues that the difference between linear history and cyclical history has been interpreted as the difference between Western and non-Western history (see Mircea Eliade, *The Myth of the Eternal Return: Cosmos and History* (Princeton University Press 2005) 51–92) ; as the difference between written culture and oral culture (see: Jack Goody, *The Domestication of the Savage Mind* (Cambridge University Press 1977)); or as the difference between modern nationalistic mindset and traditional historical mindset (see Prasenjit Duara, *Rescuing History from the Nation: Questioning Narratives of Modern China* (University of Chicago Press 1996) 27–28).

[30] Namoh Nofu Pacidal (n 14); Namoh Nofu Pacidal (n 24) 26–27.

[31] Kuo-Chao Huang, 'Representing the Past: A Pilot Study of Various Forms of History (再現過去：歷史的多種形式初探)' (2013) 5 Taiwan Literature Studies 169, 171, 173.

> storyteller. It starts the web which all stories together form in the end. One ties on to the next, as the great storytellers… have always readily shown. This is epic remembrance and the Muse-inspired element of the narrative.[32]

Benjamin's endless, non-lineal storytelling is also an appropriate way to describe the *Tafalong* tribe's storytelling. *Fuday,* a hunter in the *Tafalong* tribe, describes their stories and the core of their history: 'every story always stops by "there", and always begins from "there".'[33] This sentence shows that the foundation of their history is their myths of creation. It is an absolute origin, which reflects the individual's and the community's image. The origin maintains the *Rayray* (the order), and leads the tribal members to enter the eternal orders of tradition.[34] It creates space and time where the living and the dead, the group and the individual can coexist.

(4) Fluid and Interactive with Audience

Benjamin suggests, 'a man listening to a story is in the company of the storyteller; even a man reading one shares this companionship. The reader of a novel, however, is isolated, more so than any other reader.'[35]

The boundary between listening to stories and telling stories is ambiguous. The listener does not expect the storyteller's repetition of an old story, but the reconstruction, which

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[32] Walter Benjamin (n 11) 13.

[33] Namoh Nofu Pacidal (n 14).

[34] ibid.

[35] Walter Benjamin (n 11) s XV.

is meaningful to the storyteller and the listener. Everybody involved in the storytelling relationship makes their own new stories, and therefore stories are transformed from the past into the reality of the present. The interactions and fluid boundaries between listeners and storytellers are very obvious in indigenous people's oral tradition.

7.2 When Oral History Becomes *Lieux de Mémoire*

7.2.1 The Decline of Oral Tradition

However, 'in the course of modern times dying has been pushed further and further out of the perceptual world of the living', the storyteller has lost his authority. Today, the distinction of life and death becomes more and more absolute, so the space of in-between is disappearing.

As Benjamin points out, by invention of printing, novels replace storytelling,[36] the encouragement of using a writing system in the 'modern' society also triggers the decline of indigenous people's oral tradition. Moreover, when the coloniser introduced centralised management and governance, personal and multi-version oral histories were repressed. Indigenous people's sense of time and space has also been disturbed by the colonial government. Gradually, indigenous peoples' losing its oral tradition impacted the essentials of indigenous peoples' life.

[36] Benjamin suggests that 'the earliest symptom of a process whose end is the decline of storytelling is the rise of the novel at the beginning of modern times…The dissemination of the novel became possible only with the invention of printing.' See: ibid V.

The Protection Act becomes a tool for indigenous peoples to respond to the decline of oral tradition. Especially when other legal issues of indigenous peoples' rights cannot be solved immediately, the Protection Act has even provided more functions than were expected by the lawmakers. Contrary to colonial archives, which have been criticised to construct indigenous peoples as 'the other',[37] the bottom-up archives of their TCEs based on the Protection Act becomes a platform to preserve their memories. The description of subject matter's historical background in the application form requires tribal consensus, which provides an opportunity to look back their multi-version memory. Like *Pakedavai*'s example mentioned in Chapter 6, after several colonial regimes have deconstructed their oral history, they consider the preparation of registration as the last chance of recording and preserving their withering traditional culture.[38] Therefore, after finishing the recording of *Pakedavai*'s family song, the elder concluded that 'I have completed my responsibility that my ancestors left to me.' She did not set her final goal in her life to tell more people in person the tribe's myths and history, but chose to leave a record with assistance of digital media. She knew that the record is not only for her next generation but also for the government's documentation and registration, but archiving her memories is meaningful for her.

[37] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press 1999) 203–205; Jane E Anderson, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* (Edward Elgar Publishing 2009) 76–78; Ann Laura Stoler, 'Colonial Archives and the Arts of Governance' (2002) 2 Archival Science 87, 94–103.

[38] Chiu, Pakedavai Zepulj and Dabiliyan Ahlifu (n 7) 33.

Why are indigenous peoples willing to participate in the process of registering their TCEs and to ignore the drawbacks of official registration, such as endless paper works, documentation, and fixed versions of stories? One of the reasons may be that indigenous peoples transform the meaning of registration, and regard the process of application as establishing a site of memory.

7.2.2 'When Myth Becomes History':[39] *Lieux de Mémoire*

According to the researchers' observations described in Chapter 6, the practice of registration based on the Protection Act is not merely a legal process. After the coloniser's ignorance has persisted for many years, the process becomes a rare opportunity for indigenous tribes to negotiate and confirm their subjectivity and sovereignty. Moreover, upon being granted the exclusive rights of TCEs, indigenous peoples will obtain an extra tool to maintain their living memory by rejecting the outsiders' unauthorised intervention and cultural appropriation. Therefore, the tribes have reorganised the traditional decision-making platform, collected their oral history, and confirmed the subject matter of their application forms through tribal negotiation and meetings. Beyond the Protection Act's original purpose, the process of registration and the materials which indigenous

[39] Claude Lévi-Strauss, *Myth and Meaning* (Routledge 2003) 15. In his view, registration may become a mechanism which gradually transfers myths to (written) history.

people produce for application have become *lieux de mémoire*[40] (the sites of memory) through the tribe's actions.

I use Pierre Nora's idea of *lieux de mémoire* to describe the tribes' production and record of their memory under the Protection Act. According to the cases I collect, the idea of *lieux de mémoire* shows the phenomenon that Taiwanese indigenous peoples are willing to enter the coloniser's scheme to perform and negotiate their traditions and culture.

Nora suggests that a *lieu de mémoire* 'is any significant entity, whether material or non-material in nature, which by dint of human will or the work of time has become a symbolic element of the memorial heritage of any community'.[41] In the world where memory declines, '*lieux de mémoire* originate with the sense that there is no spontaneous memory, that we must deliberately create archives.'[42] Traditionally, indigenous people do not need *lieux de mémoire*. Moreover, it has been observed that their oral tradition did not distinguish memory and history. After the colonial government began to govern indigenous people through their writing systems, indigenous people's oral tradition was degraded as memories, myths or legends, and indigenous people were evaluated as people without history.[43]

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[40] Nora (n 23).

[41] Pierre Nora, 'Preface to the English-Language Edition' in Pierre Nora (ed), *Realms of Memory: Conflicts and divisions* (Columbia University Press 1996) xvii.

[42] Nora (n 23) 12.

[43] Yang (n 16) 56.

Furthermore, the decline of oral tradition due to the modern state's governance deepens indigenous peoples' sense of loss. Education provided by the modern state has also gradually changed indigenous people's way of memorising their historical events and stories. Therefore, in recent years, they have recorded many written archives and published their legends in order to preserve their memory. In their daily life they create *lieux de mémoire* to strengthen their cultural practice consciously or unconsciously.

The more endangered indigenous peoples' culture and memory are, the more enthusiastically they construct *lieux de mémoire*, because archives and monuments sometimes are able to provide illusions of eternity. As Nora suggests, *lieux de mémoire* are a defence of minorities who have a privileged memory, and protected areas where the memory has retreated. However, if history did not deform and transform memories, there would be no *lieux de mémoire*.[44]

On some occasions, lieux de *mémoire* becomes the replacement of in-between people, like Benjamin's storytellers and *Amis* people's *maduasai* (ancestors/elders), since *lieux de mémoire* are also in-between. Nora suggests that *lieux de mémoire* are 'simple and ambiguous, natural and artificial, at once immediately available in concrete sensual experience and susceptible to the most abstract elaboration.' [45] They also are 'mixed, hybrid, mutant, bound intimately with life and death, with time and eternity; enveloped in a Mobius strip of the collective and the individual, the sacred and the profane, the

[44] Nora (n 23) 12.

[45] ibid 18.

immutable and the mobile.'[46] *Lieux de mémoire* are the ambiguous site between open and closed:

> Lieux de mémoire have no referent in reality; or rather, they are their own referent: pure, exclusively self-referential signs. This is not to say that they are without content, physical presence, or history; it is to suggest that what makes them lieux de mémoire is precisely that by which they escape from history. In this sense, the lieu de mémoire is double: a site of excess closed upon it, concentrated in its own name, but also forever open to the full range of its possible signification.[47]

These ambiguous and hybrid characteristics can function on many occasions to meet people's desire to preserve their memory, so *lieux de mémoire* become an alternative for indigenous peoples when their oral traditions and storytellers begin to disappear. They are between written history and intangible memory. I will analyse in this section two examples outside the Protection Act and see how the site of memory has already been a conventional way for indigenous peoples to negotiate their memory before the enactment of the Protection Act, and then return to examine seven applications approved by the Council of Indigenous Peoples in the next section. I argue that applications are building *lieux de mémoire* that have been negotiated within their own indigenous groups and with the government. After being approved, these applications are published to the public and turned into a legal right. It is a new stage for indigenous people to negotiate with the outsiders.

[46] ibid 19.

[47] ibid 23–24.

Bunun's Hunting as Lieu de Mémoire

The Anthropologist Shu-Yuen Yang uses *Bunun*'s case to show an indigenous people's ongoing process that transforms the official activities into *lieux de mémoire*.

The Haiduan township (海端鄉) in Taitung county (台東縣) officially supported 'a journey in search of root' for local *Bunun* people. The purposes of the journey initially set by the Haiduan township are as follows: first, to collect more photos and documents regarding the *Bunun* hero, *Lamatasinsin*. Second, to explore the history that the *Bunun* fought against the Japanese colonial regime. Third, to publish the information gathered by this journey, in order to trigger *Bunun*'s love of their hometown and country. Fourth, to develop tourism. The office of Haiduan Township also hired two professional photographers and planned to record the *Bunun*'s journey in search of their roots.[48]

Although these *Bunun* people knew the original purpose set by the government; they transformed the journey in search of their roots into a *hanup* (hunting). *Hanup* is always an important social practice for *Bunun* to learn historical knowledge and reconstruct their memory.[49] However, recently *Bunun*'s hunting activities are disappearing because the tribe's traditional hunting territories have decreased due to the state's control of the use of 'public land'. In addition, hunting activities were restricted according to the Wildlife Conservation Act and the Controlling Guns, Ammunition and Knives Act. Therefore, their memories of hunting cannot be spontaneously produced but have to be constructed on

[48] Yang (n 16) 50.

[49] ibid.

purpose.[50] Yang observed that in the process of this journey, the elders tried their best to narrate their memories to the young tribal members, on such subjects as knowledge, taboos, and legends with regard to *Bunun*'s hunting. When the elders walked in the hunting area, they also taught the youngsters about their ancestors' migration and the traditional names of the places which they passed by and could overlook.[51]

Making good use of the government's resources, the hunting has transformed from a traditional daily life to a site of memory, which is *Bunun*'s effort to maintain their memory and history. In recent years, they became aware of their power to claim their own history after realising the danger of breaking with the past. The reconstruction of memory is a step in maintaining their identity.[52]

Publications of Oral Stories

The same intention appeared in the publication of indigenous peoples' oral stories. In the past, research regarding indigenous people translated their oral tradition into the language of anthropology, history, philosophy, linguistics and literature.[53] The Japanese colonial government began to record many oral stories into written form. Taiwan's government published a series of *The History of Indigenous Peoples* from 1993 to 2000,

[50] ibid 57–58.

[51] ibid 51–52.

[52] ibid 57–58.

[53] Huang (n 31) 183.

including the history of ten peoples. But more than half of the authors of these works are non-indigenous peoples.[54]

It is ironic that indigenous people's history and subjectivity has to be confirmed by the intervention of writing. Representation by others always creates an unbalanced relationship between the researchers and indigenous people, so in order to reverse the power relationship, indigenous people began to write their own history. Multi-versions of publications of indigenous peoples' legends also began to appear in Taiwan's book market.

Like indigenous peoples' publications of oral stories, the registration system in the Protection Act is a platform to write their history. They can influence the registration system, but of course the system also influences their sense of history. As Nora describes the change, 'the passage from memory to history has required every social group to redefine its identity through the revitalization of its own history. The task of remembering makes everyone his own historian.'[55] The next section will focus on seven TCEs which have been approved to register under the Protection Act, in order to explore how indigenous people have negotiated with the government, academic surveys and colonial archives, and how they build their sites of memories in the registration.

[54] Kuo-Ming Hsu, 'When Myth Becomes History: Construction of History and Cultural Politics of the Indigenous People in Taiwan in the 1990s' (2014) 19 Journal of Taiwan Literary Studies 89, 97–100.

[55] Nora (n 23) 15.

7.3 Seven Registered TCEs under the Protection Act

On October 25, 2017, seven applications of TCEs were approved to register by the Taiwan government for the first time and the *sui generis* right was granted to the applicants. The registered TCEs were: (1) the *Fata'an* tribe's male traditional clothing five-piece tassel skirt *(o fohkar no kapah i piilisinanno niyaro' no Fata'an),* (2) the *Fata'an* tribe's traditional leader's ceremonial top hat *(o Pakowawan no Fata'an Sapalengaw)*, (3) the *Fata'an* tribe's traditional fishing technique *(Palakaw)*, (4) the *Tfuya* tribe's ceremonial song (*tohpxngx*), (5) the *Tfuya* tribe's traditional costume *(yxsx no cou ta tfuya)*, (6) the *Seediq* people's traditional house *(sapah cbiyaw/sapah cbeyo/sapah sbiyaw)*, and (7) the *Thao* people's pestle-pounding music and performance, including ceremonial music (*Mashtatun),* non-ceremonial music (*Mashbabiar*) and folksong *(Izakua)* and the long pestle (*taturtur*).

Examining indigenous peoples' application forms and their attachments provided to the Council of Indigenous Peoples for approval, registration of TCEs support two important functions. The first function is to create the legal right. The applicants attempted to make their claim clear, so the claim of TCEs is easily understood by outsiders in order to prevent infringement. The second function is to establish the site of memory, because indigenous peoples desired to establish the symbol of indigenous peoples' positive action by recording their memory and culture in the archive of the modern state. These two functions create the characteristics of in-between and hybridity of registration, which shows how the registration of TCEs works as the postmodern storyteller and the postcolonial site of memory. I analyse these characteristics by three different points:

indigenous people's negotiations with academic research and colonial archive, the hybrid concept of time, and the blurred distinction between memory-based and print-based registration.

7.3.1 In-between Perspectives: Negotiation with the Coloniser's Research

An examination of the seven approved application forms reveals that TCEs which have been researched by anthropologists are more readily approved to register and granted the exclusive rights. All approved applications contain the applicants' reference to the documents or photos recorded by Japanese anthropologists under the Japanese colonial regime or the recent research of the Academia Senica, the highest academy of Taiwan. However, it is also observed that indigenous peoples' applications do not copy these documents and research; on the contrary, most of the applicants critically examine the academic research and colonial archives. It was also noted that both indigenous people and the examiners of the applications welcome the **in-betweener**'s opinion.[56] That is to say, the tribal member who is also the scholar trained by the "modern" academic institution is supposed to be reliable and persuasive in the process of application and examination.

[56] The discussion of the role of inbetweeners in Taiwan's historical research, please see: Nakao Eki Pacidal, 'The Face of the Inbetweener: The Image of Indigenous History Researcher as Reflected in Seediq Bale (中間者之臉：《賽德克・巴萊》的原住民歷史研究者映像)' (2012) 77 NTU Humanitas Taiwanica (臺大文史哲學報) 167.

Fata'an's Applications

The *Fata'an* tribe filed three applications, and all three applications were approved to register. The first application (*Fata'an* five-piece tassel skirt) refers to the colonial Japanese government's investigation in 1914, *An Investigation of the Aborigines in Taiwan: Vol.2*[57] and the Academia Senica's 1962 research, *Material culture of the Vataan Ami: A Report on the Material Life of a Taiwan Native Tribe.*[58] Secondly, in the application form for the traditional leader's ceremonial top hat, reference is made to the Academia Senica's 1962 research.[59] Moreover, the top hot of the 66th *Sapalengaw* (traditional leader) *Unak Tafang* has been reserved in the archive of the Academia Senica, so *Fata'an* used the photo and the item number of the Academia Semica's archive to prove the authenticity of the tribe's description in the application form.

Fata'an's third application, the traditional fishing technique (*Palakaw*), quotes the Academia Senica's research in 1960, *The Fishing Life of the Vataan Ami*.[60] The research recorded the native informant's comment, 'The *Fata'an* tribe is the only *Amis* tribe that performs the tradition of *Palalaw*. Other Amis tribes do not have such tradition'.[61] The

[57] Y. Sayama (佐山榮吉) (ed), *An Investigation of the Aborigines in Taiwan: Vol.2 / Amis Kiwit, Tafalong, Fataan, and Coast (1914) (蕃族調查報告書第二冊：阿美族奇密社、太巴塱社、馬太鞍社、海岸蕃)* (Academia Sinica tr, Academia Sinica 2009) 185–186.

[58] Li Yih-Yuen, *Material culture of the Vataan Ami: A Report on the Material Life of a Taiwan Native Tribe (馬太安阿美族的物質文化)* (Institute of Ethnology, Academia Sinica 1962) 97–130.

[59] ibid 124–127.

[60] Chi-chien Chiu, 'The Fishing Life of the Vataan Ami (馬太安阿美族的漁撈生活)' (1960) 10 Bulletin of the Institute of Ethnology, Academia Sinica 57.

[61] The Fata'an Tribe, 'The Application Form of Palakaw, Fata'an Traditional Technique (巴拉告傳統捕魚技藝工法)' (*The Website for the Protection of Indigenous People's Traditional Cultural Expressions (原住民族傳統智慧創作保護資訊網)*, 2017) 4 <http://www.titic.apc.gov.tw/ir2015db/palakaw-%E5%B7%B4%E6%8B%89%E5%91%8A%E

application also mentions that *Fata'an*'s *Palakaw* has been introduced in the teaching material of Taiwan's elementary schools. Therefore, both the government's teaching material and the academic research support that *Fata'an* is the sole holder of *Palakaw*.

Lalan, the representative of *Fata'an* in charge of the application, showed a book full of book marks and notes in a television interview that, 'it is fortunate for us that in 1962 the Academia Senica conducted the field research in our tribe and published its results. In order to prepare our application, we even studied the 1962 academic report together every morning meeting in our annual ceremony *(Ilisin)*.'[62] *Fata'an*'s cooperation with the existing anthropological research, which fortunately matches *Fata'an*'s memory and legal claims, is an undeniable factor for obtaining the exclusive rights of their TCEs.

Tfuya's Applications

Two *Tfuya* applications were approved to register. In the application of *Tfuya's* traditional clothing *(yxsx no cou)*, they adopt Satou Bunichi's (佐藤文一) research that was sponsored by the Japanese colonial government in 1942, *Research on the Primitive Art of Taiwan's Indigenous Races,*[63] to refer to the past of their traditional costume. In the application of

5%82%B3%E7%B5%B1%E6%8D%95%E9%AD%9A%E6%8A%80%E8%97%9D%E5%B7%A5%E6%B3%95> accessed 1 April 2018.

[62] TITV, *Voice from Eastern Coast, Episode 205 (東海岸之聲第 205 集)* (2018) <https://www.youtube.com/watch?v=cHLni_VcZes> accessed 27 March 2018.

[63] Bunichi Satou, *Research on the Primitive Art of Taiwan's Indigenous Races (台灣原住種族の原始藝術研究)* (SMC Publishing Incorporated 1942).

the ceremonial song (*tohpxngx)*, they cited the outsider's ethnomusicological research[64] on the social meaning of their ceremony *Mayasvi*. From today's perspective, Satou Bunichi's research is a typical research under Japanese colonisation, which describes indigenous peoples' culture as primitive and the other and denies their coevalness.[65] However, *Tfuya* only adopted information collected by Satou Bunichi regarding the materials of traditional clothing as 'the past' of their traditional costume, took more photos of their costumes as the TCE's 'present', and concluded that the material of the traditional costume has changed.[66]

Moreover, in *Tfuya*'s applications, an essential part of their reference is from the research of their tribal members, Zhong-Yong Pu and Zhong-Cheng Pu, who are well-established scholars of literature and culture studies. Acting the ***in-between*** role, the tribal member with 'modern' academic abilities and skills becomes the most popular opinion for both reviewers and applicants.

Thao's Application

[64] Li-Kuo Ming (明立國), The Ceremonies of Taiwanese Indigenous Peoples (台灣原住民族的祭禮) (Taiyuan Publishing (臺原出版社) 1989).

[65] Wei-chi Chen, 'Book Review: Matsuda Kyoko, The Logic of Empire: Japanese "Empire" and the Taiwanese Aborigines (Tokyo: Yushisha, 2014) (書評：松田京子，《帝国の思考：日本「帝国」と台湾原住民》(南山大学学術叢書)(東京：有志舎，2014))' (2014) 17 Research in Taiwan Studies (台灣學研究) 151, 155–156.

[66] The Tfuya Tribe, 'The Application Form of Traditional Custome (Yxsx No Cou 男女傳統服飾)' (*The Website for the Protection of Indigenous People's Traditional Cultural Expressions (原住民族傳統智慧創作保護資訊網)*, 2017) 6 <http://www.titic.apc.gov.tw/ir2015db/yxsx-no-cou-%E7%94%B7%E5%A5%B3%E5%82%B3%E7%B5%B1%E6%9C%8D%E9%A3%BE> accessed 1 April 2018. The labeling of the past will be further analysed in Section 6.3.3.2.

The *Thao* people lives around the Sun-Moon Lake, which has been a popular destination for tourists since the period of Japanese colonisation. Therefore, the application form of *Thao*'s pestle-pounding music and performance attaches many photos of performance of pestle music which were taken by the Japanese.[67] These photos have been reserved in the Academia Senica and the Department of Anthropology, National Taiwan University and were provided to the *Thao* people for their applications. The *Thao* people also uses the anthropologist's 1958 report[68] to prove the uniqueness of their pestle-pounding music, but correct the wrong names used in the report when describing in their ceremonies.

Seediq's Application

The subject matter of the *Seediq*'s approved application is *Seediq*'s traditional house, including its structure, exterior characteristics and interior design. Their application pays attention to the process of reconstructing the house and its cultural meaning. It emphasises that 'the main purpose of the construction and representation of our traditional house is to restore the symbolic meaning of the house. After the traditional

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[67] The Thao People, 'The Application Form of Pestle-Pounding Music and Performance, Including Ceremonial Music (Mashtatun), Non-Ceremonial Music (Mashbabiar) and Folksong (Izakua) and the Long Pestle (Taturtur) (Mashtatun 邵族儀式性杵音 / 音樂、Mashbabiar 邵族非儀式性杵音與 Izakua 歌謠 / 音樂、歌曲、taturtur 長木杵 / 雕塑)' (*The Website for the Protection of Indigenous People's Traditional Cultural Expressions (原住民族傳統智慧創作保護資訊網)*, 2017) <http://www.titic.apc.gov.tw/ir2015db/mashtatun%E9%82%B5%E6%97%8F%E5%84%80%E5%BC%8F%E6%80%A7%E6%9D%B5%E9%9F%B3-%E9%9F%B3%E6%A8%82%E3%80%81-mashbabiar%E9%82%B5%E6%97%8F%E9%9D%9E%E5%84%80%E5%BC%8F%E6%80%A7%E6%9D%B5%E9%9F%B3%E8%88%87izakua%E6%AD%8C%E8%AC%A0-%E9%9F%B3%E6%A8%82%E3%80%81%E6%AD%8C%E6%9B%B2%E3%80%81-taturtur%E9%95%B7%E6%9C%A8%E6%9D%B5-%E9%9B%95%E5%A1%91> accessed 29 March 2018.

[68] Chi-Lu Chen, *A Report of the Thao People in the Sun Moon Lake (日月潭邵族調查報告)* (Department of Anthropology, National Taiwan University 1958).

house is given the symbol of rituals and memory…it can recall Seediq's identity and subjectivity.'[69]

In the application form, the *Seediq* people uses maps, drawings and photos provided by the Japanese architect Suketaro Chijiiwa's (千千岩助太郎) investigation[70] carried out during Japanese colonial rule.[71] Another important reference is the field work conducted by the project team of reconstruction of the *Seediq* traditional house in 2011.[72] Iwan Perin, a member of the *Seediq* people and also an anthropologist, joined the project team. With *Seediq* experience and academic training background, her in-between qualification played an important role in this reconstruction project and the registration of the *Seediq* traditional house.

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[69] The Seediq People, 'The Application Form of Seediq's Traditional House: Structure, Exterior Characteristics and Interior Design (Sapah Cbiyaw/Sapah Cbeyo/Sapah Sbiyaw, 傳統家屋:構造形式、 外型特徵、室內格局)' (*The Website for the Protection of Indigenous People's Traditional Cultural Expressions (原住民族傳統智慧創作保護資訊網)*, 2017) 21 <http://www.titic.apc.gov.tw/ir2015db/sapah-cbiyaw-sapah-cbeyo-sapah-sbiyaw%E5%82%B3%E7%B5%B1%E5%AE%B6%E5%B1%8B-%E6%A7%8B%E9%80%A0%E5%BD%A2%E5%BC%8F%E3%80%81-%E5%A4%96%E5%9E%8B%E7%89%B9%E5%BE%B5%E3%80%81%E5%AE%A4%E5%85%A7%E6%A0%BC%E5%B1%80> accessed 30 March 2018.

[70] Suketaro Chijiiwa, *The Collection of Surveying and Mapping of Taiwanese Indigenous Peoples' House 台灣高砂族住家調查測繪手稿全集* (Department of Architecture, National Taipei University of Technology 2012).

[71] The Seediq People (n 69) 19–20.

[72] Chih-Hong Huang and others, 'Participatory Research on Restoring the Ancestral Village Homes of the Seediq People (賽德克族部落參與式祖屋復原研究)' (2013) 32 Ethnologia 1. The project of reconstructing Seediq ancestral homes is sponsored by the government. Chapter 7 will further explore the process of reconstruction.

The reconstruction of *Seediq* traditional house is also constructing *Seediq*'s site of memory. The project team invited the elders and cultural workers of the tribe to join the tribal meetings.[73] In the meetings, the project team collected the elder's memories of diverse versions, and corrected Suketaro Chijiiwa's survey based on tribal discussions. The conclusions of the meeting and the revised maps and drawings were added in the application form. Finally, they referred to their own survey and tribal discussions to build a 'new' traditional house and attached a video recording of constructing a traditional house to the application form.[74]

According to the approved applications, the reference of colonial anthropological survey is not adopted without discussion and consideration. *Lalan* suggests that if an anthropological survey is referred in the application form it means that it has been confirmed by the tribal consensus and is more reliable.[75] On the other hand, as mentioned above, the tribes referred to the anthropological survey critically, as the *Thao* people directly corrected content of colonial survey in the application form. Indigenous peoples can respond to the outsider's survey in the platform of TCE registration, and via the government's notification to the public, they can have their own voice in the interpretation of their own culture.

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[73] The Seediq People (n 69) 22.

[74] ibid 26.

[75] TITV, *Taiwan Indigenous Perspective Episode 197: Indigenous People's Views on the Protection of Traditional Cultural Expressions (部落大小聲第 197 集：族人看原住民族傳統智慧創作專用權與保障)* (2017) <https://www.youtube.com/watch?v=sHMcBAkWhzA> accessed 3 April 2018.

7.3.2 Hybridity of Time

The template of the application form provided by the government suggests that the applicants should describe the past, the present and the future of the TCE. The template implies that the Protection Act does not only protect the past and traditional aspect of TCEs: the applications should show the living status of TCEs and the possibility of change in the future, and this will be also covered in the scope of protection of TCE claims and can prevent outsider's misuse. The Protection Act does not imagine TCEs as the past, or require the applicant to "turn back the clock" as Rahmatian criticised.[76]

Indigenous Peoples' Denial of the Denial of Coevalness

The anthropological works quoted in these seven applications are all categorised as 'the past' by indigenous peoples. It is the beginning of reversing the power relation: Although anthropologists and colonial archives labelled indigenous peoples' TCEs as primitive, past or timeless, in the registration of TCEs the applicants label the image and the interpretation provided by the anthropologists and colonisers as the past. The anthropologists' nostalgia and the ideology of civilisation in the colonial discourse marked indigenous peoples as the past and denied their coevalness, but now indigenous peoples have the power to mark the colonial research and archive of their TCEs as the past, in order to claim the present and the future of their TCEs.

[76] Andreas Rahmatian, 'Neo-Colonial Aspects of Global Intellectual Property Protection' (2009) 12 Journal of World Intellectual Property 40, 60.

'Recent' Tradition

The 'invention of tradition', about which some anthropologists are worried and uncertain, can also be protected according to the Protection Act. Among the seven approved applications, the *Thao* people's non-ceremonial music (*Mashbabiar*) and Folksong (*Izakua*) are good examples. As their applications describe,

> Mashbabiar was transformed from Mashtatun (ceremonial pestle music). In the period of Japanese rule, Japanese tourists often visited the Sun Moon Lake, which the Thao lived nearby. Tourists noticed the beautiful sound of pestle sounds during our ceremony, and hoped that *Thao* could perform pestle music for them… From then on, Mashbabiar became the *Thao* people's important economic activity.[77]

Ceremonial pestle music (*Mashtatun*) is also registered as a living culture rather than as a 'traditional' and frozen culture. *Thao* describes in their claim:

> Traditionally, only women performed the ritual. Some men hunted in the mountain, the other had to *muruza*, which means guarding the tribe's safety…Currently, in order to respond to the changing circumstances in the contemporary world and to pass down our ritual, all men and women in the tribe are able to participate in *Mashtatun*.[78]

Multi-version Tradition

[77] The Thao People (n 67) 12.

[78] ibid.

Oral tradition's multi versions can also be registered. The *Tfuya* tribe registered their multi-version ceremonial song by attaching five versions of lyrics of their *tohpxngx* and two versions of the melody in their application.[79] They emphasise in the application form that the lyrics are the prayer in their ceremony, and they will continue to be added to, transformed and revised. Different families in *Tfuya* have different versions of *tohpxngx,* since the lyrics of their *tohpxngx* represents their different histories of migration and their different stories after they moved to *Tfuya*. They also indicate the living characteristics of TCEs in the application form: 'the lyrics will be added and transformed in the future, in order to respond to different families' living stories and to be understood, praised and passed down by our people.'[80]

The same style of defining their changing and multi-version culture has been adopted by other applicants. For example, the *Thao* people attached the notation of the folksong *Izakua* in the application but added a note to emphasise that 'this score is only one version, but the variation may occur.'[81] The *Seediq* people drew the detail of the structure and interior design of their traditional house, but also extended the scope of claim by adding the note, 'the ratio and measure of the house will change in different environments'.[82]

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[79] The Tfuya Tribe, 'The Application Form of Tfuya's Tohpxngx (鄒族特富野社歷史頌)' (*The Website for the Protection of Indigenous People's Traditional Cultural Expressions (原住民族傳統智慧創作保護資訊網)*) 14 <http://www.titic.apc.gov.tw/ir2015db/%E9%84%92%E6%97%8F%E7%89%B9%E5%AF%8C%E9%87%8E%E7%A4%BEtohpxngx-%E6%AD%B7%E5%8F%B2%E9%A0%8C> accessed 26 March 2018.

[80] ibid 12.

[81] The Thao People (n 67) 10.

[82] The Seediq People (n 69) 8, 10–11.

Representing authenticity of culture in the registration is still the applicant's concern, but the negotiating function supported by registration should be more essential for the applicants. In this sense, the doubt of emphasising 'tradition' and essentialism of TCEs in the registration can partly solved. Indigenous peoples' denial of 'the denial of coevalness' also opens a new possibility to negotiate with the temporality of the modern state and anthropological research.

7.3.3 Blurring the Distinction between Memory-base and Print-base Registration

Many tribes use audio and video documentation to file their application. As mentioned in Section 4.4, the *Seediq* people used recording equipment to digitalise their worship songs and filed their applications, in order to avoid the conflicted opinions of reviewers recording their songs using staff notation. Among the seven cases which have been completed, digital recordings of *Thao*'s pestle music, *Seediq*'s construction of their traditional house, and *Tfuya*'s *Tohpxngx* are attached to their application forms.[83] Table 3 shows how the applicants attach digital files to define and represent their TCEs.

Subject Matters	**Attachments**
Fata'an's male five-piece tassel skirt	The photos of five-pieces skirts.

[83] *Thao*'s pestle music and Seediq's reconstruction of traditional house were recorded on a DVD and attached to the files of application, see: The Thao People (n 67) 13. After they were approved to register, the video has been posted on the Youtube and the website of the Council of the Indigenous Peoples, see: *Attachment: Tfuya's Tohpxngx 2014 (公告附件 鄒族特富野社 Tohpxngx 歷史頌影音檔)* <https://www.youtube.com/watch?v=fuGrhpNyFDY&feature=youtu.be> accessed 29 March 2018.

Fata'an's ceremonial top hot	(1) item number (no.20093) of the top hot of the 66th traditional leader *Unak Tafong*, preserved in the Ethnography Institution, Academia Senica and (2) the photos of the top hot currently used in the Fata'an tribe.
Fata'an's traditional fishing technique *Palakaw*	The photos of fishing tools.
Tfuya's ceremonial songs	(1) The video recording of Tfuya's ceremony, *Mayasvi,* (2) two versions of notation of songs and (3) five versions of lyrics.
Tfuya's traditional costume	The photos of traditional costume.
Seediq's traditional house	(1) The video recording of reconstructing a *Seediq* traditional house and (2) the photos of traditional house in different tribes.
Thao's pestle music	(1) The photos of *Thao*'s performance of pestle music, (2) the video recording of the ceremony of worshipping ancestral spirits, *Lus'an* and (3) the video recording the performance pestle music.

Table 3: Digital files attached by the applicants.

The digital copies of TCEs were attached to these applications. The phenomenon found in the registration of TCEs is not identical to Sherman's and Bently's observation about modern registries, which represents the creation in pictorial or written terms rather than by a copy or a model.[84] Moreover, although Sherman and Bently argue that in modern

[84] Sherman and Bently (n 2) 72.

registries the standardisation of verbal and visual formulae produced 'a shift from memory-based to print-based methods,'[85] digital media can create different ways for indigenous peoples to express and document their culture. Recognition of multi-versions of TCEs is also a beginning to respect the diversity of memory.

Finally, as analysed in the last section (Section 7.3.2), the process of registration itself is a process that allows indigenous peoples to reconfirm their memory and build a site of memory, so the binary distinction of print-based and memory-based method has been blurred in the registration of TCEs. More documentation adopted in registration as a challenge to binary distinctions will discussed in the next section.

By indigenous peoples' actions, registration replaces the in-between 'storyteller' and opens a hybrid space for indigenous peoples to deposit and negotiate their memory. It cannot be degraded and described as a process of bureaucratic paper shuffling. Of course, it cannot be denied that the destiny of bureaucracy seems to be the routine of endless paperwork. However, the proper institutional design, which encourages more indigenous peoples' actions and avoids unnecessary paperwork, should be considered when making the law regarding *sui generis* rights of TCEs. This issue will be discussed in Chapter 8.

7.4 Challenging Colonial Binary Distinctions

In the final section of this chapter I would like to explore documentation and registration from the perspective of Taiwanese indigenous peoples and challenge the binary

[85] ibid.

distinctions in the conventional discourse regarding documentation of TCEs. WIPO's classifications for documentation and registration should be analysed first because they represent the conventional understanding of documentation and registration in the international IP forum.

WIPO emphasises two different approaches of protection of TCEs: preservation and IP-related protection. WIPO suggests that preservation of TCEs essentially 'consist[s] in the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance or viability.' [86] On the other hand, IP protection exists to prevent TCEs from being used without authorisation or being misused.[87]

Furthermore, documentation may be used in both ways. First, the preservation/safeguarding of TCEs includes 'the preservation in the fixed term, such as when they are documented'. [88] Documentation in this way is regarded as the non-

[86] WIPO, 'Documentation of Traditional Knowledge and Traditional Cultural Expressions, Background Paper (WIPO/TK/MCT/11/INF/7)' (2011) 5.

[87] ibid 7.

[88] ibid 5. WIPO defines 'fixation' as 'capturing a work or object of related rights in some material form (including storage in an electronic (computer) memory) in a sufficiently stable form, in a way that on this basis the work or object of related rights may be perceived, reproduced or communicated to the public.' See: WIPO, 'Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms' (2004) 290.

customary use/preservation of TCEs. [89] Second, in the field of IP protection, documentation can also be linked to a defensive[90] or positive way of protection[91].

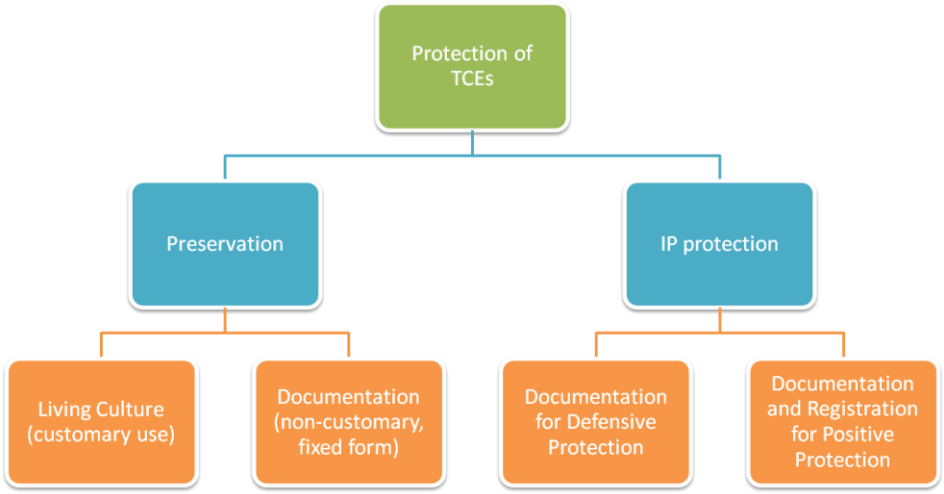

Figure 8: WIPO's distinction between preservation and IP-related protection, created by the author.

Figure 8 can be used to help understand WIPO's distinctions relating to protection of TCEs. There are two distinctions in two layers when discussing protection of TCEs. The first distinction is that WIPO often mentions two different methods of 'protections' of TCEs, including preserving/safeguarding TCEs and IP-related rights preventing misuse of TCE.

[89] WIPO, 'Documentation of Traditional Knowledge and Traditional Cultural Expressions, Background Paper (WIPO/TK/MCT/11/INF/7)' (n 86) 5–6. However, replication of the original form and representation in the process of documentation can also be native cultural traditions. Using Kayapo's case, Turner argues that 'successive repetitions of the same pattern' is regarded as 'beauty' in Kayapo's culture. See: Terence Turner, 'Representation, Politics, and Cultural Imagination in Indigenous Video: General Points and Kayapo Examples' in Faye D Ginsburg, Lila Abu-Lughod and Brian Larkin (eds), *Media worlds: anthropology on new terrain* (University of California Press) 83. The Kayapo case will be furthered explored in the next section.

[90] Defensive protections refer to 'ensuring that third parties do not unduly acquire IP rights over TK or TCEs.' See: WIPO, 'Documentation of Traditional Knowledge and Traditional Cultural Expressions, Background Paper (WIPO/TK/MCT/11/INF/7)' (n 86) 9.

[91] Positive protections refer to granting IP rights to TCEs owner. See: ibid 8.

The second distinction is that WIPO emphasises dual purposes of preservation of TCEs and dual methods of IP protection. In preservation of TCEs, one is preserving TCEs in the customary framework, and the other is recording TCEs in the fixed form, which is 'different from the traditional ways of preserving and passing on traditional knowledge and traditional cultural expressions within the community.'[92] In the area of IP protection, documentation of TCEs can be for defensive (or negative) protection or positive protection.

WIPO points out that documentation for preservation may influence IP-related right holders of TCEs, but suggests that the two methods of protections can be reconciled,

> At times, the aims of documentation for preservation and safeguarding purposes have been seen to contradict the IP-related interests of TK/TCE holders. There are concerns that documentation can make TK and TCEs freely available and lead to their misappropriation and uses in ways not intended by the holders and against their wishes. In concrete terms, documentation of TK and TCEs, particularly digitization, can make them more accessible and vulnerable to unauthorized use and exploitation, thereby undermining the efforts to protect them… [93] Nevertheless, preservation/safeguarding and IP protection are not mutually exclusive.

[92] WIPO, 'Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (WIPO/GRTKF/IC/29/INF/7)' (2015) 12.

[93] WIPO, 'Documentation of Traditional Knowledge and Traditional Cultural Expressions, Background Paper (WIPO/TK/MCT/11/INF/7)' (n 86) 10. Also see: 'Draft Outline of an Intellectual Property Management Toolkit for Documentation of Traditional Knowledge WIPO/GRTKF/IC/4/5' (2002) 2; Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(J) and Related Provisions of the Convention on Biological Diversity, 'Considerations for Developing Technical Guidelines for Recording and Documenting Traditional Knowledge and the Potential Threat of Such Documentation UNEP/CBD/WG8J/5/3/Add.2' (2007) 3–4; SELA, 'Protection of Traditional Knowledge, Traditional Cultural Expressions (Folklore) and Related Genetic Resources: SELA's Approach SP/RR-PCTEFRG-ALC/DT N° 2-09' (2009) 4–5; Wend Wendland, 'Seeking Tangible Benefits from Linking Culture, Development and Intellectual

> Having different objectives, initiatives established for cultural heritage preservation purposes and different kinds of IP registers may be implemented in conjunction with one another and help promote each other. Databases used for defensive protection may be, for example, very important for preserving threatened cultures and to safeguard against the disappearance of TK and TCEs.[94]

Besides databases used for defensive protection, WIPO believes that community-led documentation can further mediate the conflicts between preservation and IP protection. Taiwanese indigenous peoples' applications under the Protection Act are an example of community-led documentation for the purpose of creating *sui generis* rights while simultaneously preserving their memory and culture. By using bottom-up documentation, the distinction between preservation and IP-related protection is blurred. Community-led documentation will be discussed in the following section (7.4.1.1).

Moreover, the distinction between defensive (or negative) and positive IP protection has been questioned: 'The positive/negative divide is strongly defined by the Western concept of ownership—where ownership endows positive rights and anything less only negative rights.' [95] It is argued that defensive protection cannot be devaluated as

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Property' (2009) 4 International Journal of Intangible Heritage 127, 133. Wend Wendland argues in his above-mentioned article that 'the protection of IP and the safeguarding of intangible heritage have always had a somewhat uncertain and awkward relationship. This may stem in part from an inherent ambiguity in the meaning of "protect" and a need to clarify the relationship between the safeguarding of cultural heritage and the legal protection of creativity against unauthorised use.'

[94] WIPO, 'Documentation of Traditional Knowledge and Traditional Cultural Expressions, Background Paper (WIPO/TK/MCT/11/INF/7)' (n 86) 11.

[95] Jessica Christine Lai, *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* (Springer Science & Business Media 2014) 226.

'negative', since it includes indigenous peoples' consultation, consent and stewardship rights,[96] which is the core of indigenous peoples' collective concern in maintaining their TCEs.[97]

Finally, the distinction between preservation by revitalisation of living culture and preservation by documenting the fixed culture forms can also be challenged. Section 7.4.2 will analyse examples to explore the blurred boundary between customary use and non-customary use.

In detail, the following sections will discuss examples which can challenge the binary distinctions. Documentation can preserve culture in the fixed form based on the essential parts of their living culture (***Documentation based on their living culture, see Section 7.4.1.2***). In addition, as in Taiwan, documentation of TCEs is registered under the Protection Act, so the *sui generis* right guaranteed by laws will help indigenous peoples to preserve their living culture from being recorded without prior consent and from being misinterpreted and misused (***Documentation prevents unauthorised documentation, see 7.4.1.3)***.

[96] As Carpenter, Katyal and Riley suggest the model of balancing 'stewardship' against the Western concept of 'ownership', 'indigenous peoples, rather than holding property rights delineated by notions of title and ownership, often hold rights, interests, and obligations to preserve cultural property irrespective of title. That is why the language used within these approaches draws upon the themes of custody, care, and trusteeship, rather than comparably more fungible conceptions of property.' See: Kristen A Carpenter, Sonia K Katyal and Angela R Riley, 'In Defense of Property' (2009) 118 The Yale Law Journal 1022, 1067.

[97] Lai (n 95) 226.

Moreover, *Kavalan*'s bridal skirt is a story to illustrate that documentation can be a tool for the revival of living culture (***Documentation revives living culture, see Section 7.4.2).*** Finally, a case outside Taiwan, *Kayapo*'s case, reminds us the imagined gap between the non-customary documentation and customary use of living culture might not be always right (***Documentation <u>is</u> living culture, see Section 7.4.3)***.

7.4.1 Documentation for both Preservation and IP Protection

7.4.1.1 Community-led Documentation

In 2008, WIPO launched a pilot programme which allows local communities to record their own culture in order to achieve two different goals of protections of TCEs simultaneously: preservation/safeguarding TCEs, and IP-related protection of TCEs. The programme is part of WIPO's Creative Heritage Project.

Wend Wendland, the head of the Traditional Creativity, Cultural Expressions and Cultural Heritage Section in WIPO, describes WIPO's Creative Heritage Project and cultural documentation: 'The programme lies at the interface between the "safeguarding" of living heritage and its "legal protection".[98] In other words, as WIPO suggests, the bottom-up documentation project maintained by local communities can mediate two conflicting purposes of protections of TCEs. After being trained, local communities can run a self-

[98] Wendland (n 93) 133.

documentation project, which can be a tool to facilitate the preservation of living culture and enforcement of IP protection.

The training program is offered by WIPO in partnership with the American Folklife Center at the Library of Congress and the Center for Documentary Studies at Duke University in the United States of America.[99] The National Museums of Kenya also participated in the program.[100]

A documentary shows what two trainees from the local community, John and Ann, thought about WIPO's training programme. John: 'We want to participate in our own culture, documenting, protecting it, because we are archiving all this information for the future generations,' and '…the community feel now it's time for us to control what is ours so that we can determine our future.'[101] Ann felt regret: 'I remember my grandfather used to tell me a lot of stories in the evening by the fireside. He would tell me where the Maasai came from. If I were given another chance I would sit down and record everything that he said / so that I would have that forever.'[102]

[99] For a brief introduction of the training programmes supported by the American Folklife Center, see The American Folklife Center, 'Cultural Documentation Training for Indigenous Communities (The American Folklife Center, Library of Congress)' <https://www.loc.gov/folklife/edresources/ed-indigenoustraining.html> accessed 29 August 2017.

[100] WIPO, 'Training Program' <http://www.wipo.int/tk/en/resources/training.html> accessed 19 August 2017.

[101] WIPO, 'Digitizing Traditional Culture in Kenya (6'25")' </portal/en/transcripts/wipo_untv_maasai.html> accessed 29 August 2017.

[102] ibid.

In addition, as discussed in Sections 7.2 and 7.3, in Taiwan the registration supported by the Protection Act is underpinned by community-led documentation. Except for seven approved applications analysed in Section 7.3, the other community-led applications under review process have also been explored in this thesis, such as *Seediq*'s digital recording of ceremonial songs (see Section 4.3.2) and *Pakedavai*'s field study and recording regarding their oral history (see Chapter 6). In the next section, to respond to the concern that 'documentation of TK and TCEs, particularly digitization, can make them more accessible and vulnerable to unauthorized use and exploitation',[103] digital documentation in Taiwan will be exemplified to show its diverse performance.

7.4.1.2 Documentation Based on Living Culture

As analysed in Chapter 6, the process of registration is the process of building the site of memory for Taiwan's indigenous peoples. Nora also describes people's intention to archive modern memory in different media: 'Modern memory is, above all, archival. It relies entirely on the materiality of the trace, the immediacy of the recording, the visibility of the image. What began as writing ends as high fidelity and tape recording.'[104] In face of new technology, the Protection Act supports indigenous peoples' *lieux de mémoire* in two different ways: indigenous people can digitalise their own TCEs based on living culture and prevent outsiders from reproducing and manipulating their TCEs. Documentation

[103] WIPO, 'Documentation of Traditional Knowledge and Traditional Cultural Expressions, Background Paper (WIPO/TK/MCT/11/INF/7)' (n 86) 10. Also see: 'Draft Outline of an Intellectual Property Management Toolkit for Documentation of Traditional Knowledge WIPO/GRTKF/IC/4/5' (n 93) 2; Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(J) and Related Provisions of the Convention on Biological Diversity (n 93) 3–4; SELA (n 93) 4–5; Wendland (n 93) 133.

[104] Nora (n 23) 13.

based on living culture is discussed below, while documentation preventing unauthorised reproduction is discussed in the following section (7.4.1.3).

Wen-ling Lin observes Taiwanese indigenous people's documentation and suggests, when oral tradition with variety is fixed in audio and video recording, it is apparent that the camera intervenes traditional indigenous culture and triggers the reorganisation of different social relationships and networks. For example, in oral tradition, when an indigenous elder tells a story, it creates a network of elders, tribal people, oral expressions, and the elder's face and body. However, if the video equipment enters the same scene and plays a role in recording and representing indigenous culture, the interactive networks will include the elder, the photographer, the elder's stories, the expression of his or her face and body, camera, microphones, editing, dubbing, screen, subtitles, and so on.[105] Different people, things, technologies and interfaces interacting in the process of making videos will create a space where cultural meanings will negotiate.[106] The interactive networks may change, but cultural negotiation and the building of the site of memory is still part of indigenous people living culture.

[105] Wen-Ling Lin, 'Manufacturing Indigeneity: Technical Carriers and Cultural Identity in Transition (製作「原住民」：轉換中的技術載體、轉換中的文化身分)' (2013) 11 Taiwan Journal of Anthropology 155, 159.

[106] ibid 160; Philip Batty, 'Singing the Electric: Aboriginal Television in Australia' in Tony Dowmunt (ed), *Channels of Resistance: Global Television and Local Empowerment* (BFI Publishing 1993) 106; Faye Ginsburg, 'Mediating Culture: Indigenous Media, Ethnographic Film, and the Production of Identity' in Leslie Devereaux and Roger Hillman (eds), *Fields of Vision: Essays in Film Studies, Visual Anthropology and Photography* (1995) 211.

Faye Ginsburg also argues that in order to open a new space for indigenous media that understands them on their own terms, analysis needs to focus on the process of production of video and the cultural 'mediation'[107] (or what Batty calls, 'bargaining',[108] or in Bhabha's term, 'negotiation' [109]). Nowadays, indigenous people's video documentation can 'work to heal disruptions in cultural knowledge, in history memory and in identity between generations'[110]. Indigenous peoples have the ability to respond to the change of technology, so documentation in fixed form is not always unrelated to customary and living culture.

For example, the *Kalala* tribe's[111] three applications under the Protection Act, the song of worshipping ancestral spirits *(malitapod),* the suite of *Limorak* and the drinking song (*miki'epah)* of their annual ceremony have been recorded by video cameras. The process of recording was also granted sacred meaning by tribal members. The elders of *Kalala* went back to *Kalala*'s place of origin, which is called *Satoko'ay.*[112] *Satolo'ay* is also the place where the *Kalala* tribe holds their annual ceremony. Recording the ceremonial songs in *Satoko'ay* creates a connection between the authentic ceremony and its representation. It is ***documentation based on living culture***. The photo posted by the

[107] Ginsburg (n 106) 212, 216–7.

[108] Batty (n 106).

[109] Homi Bhabha, 'The Commitment of Theory' (1998) 5 New Formations 5, 11.

[110] Ginsburg (n 106) 216.

[111] Situated in the East of Taiwan, *Kalala* is a tribe consisting of *Amis* people. *Kalala* in Amis language means 'the basket', symbolising its location in a basin.

[112] With regard to Kalala's place of origin, *Satoko'ay,* see: TITV, 'Kalala's Three Migrations within 500 Years (500 年 3 次大遷徙! "迦納納"走出逆境)' (13 October 2016) <http://titv.ipcf.org.tw/news-24647>.

Kalala tribe in *Kalala*'s official Facebook page[113] shows the elders of the *Kalala* tribe sitting in front of *Satolo'ay* and the professional recording equipment and cameras that were used to record their ceremonial song. The recordings were attached to *Kalala*'s written application form.

7.4.1.3 Documentation to Prevent Unauthorised Documentation

Most of the applications based on the Protection Act are relevant to indigenous peoples' traditional rituals and ceremonies. Sometimes the subject matter is the traditional ceremony as a whole, such as *paSta'ay* and *Kanakanavu's* ceremony of rice. Others are ceremonial songs, such as the worship songs of *Amis* people's annual ceremony and *Seediq*'s traditional folk songs in their traditional ceremony. These ceremonies are very famous in Taiwan. It has bothered the tribes for a long time that visitors try to photograph and film indigenous peoples' ceremonies and distribute the photos and the recordings without the tribes' consent. Photographing and recording during the ceremonies created difficulties for the tribe's living culture. *Anu* from the *Makuta'ay* tribe suggests: 'Your souls will be taken by the camera.' But the camera's soul-taking he mentioned is not literal but symbolic: 'You will be unconsciously attracted by the gaze of cameras. You are responding to the camera, not our ceremony.'[114]

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[113] For the photo taken by the Kalala Cooperative Farm (加納納合作農場), see: 'Kalala Cooperative Farm (加納納部落合作農場)' <https://www.facebook.com/kalalacafe/photos/a.604218929637194/1032703310122085/?type=3&theater> accessed 17 September 2018.

[114] TITV, 'The Tribes Make Their Own Rule to Regulate Photography (攝影干擾祭典 部落自擬規範管制)' (8 July 2014) <http://titv.ipcf.org.tw/news-7440> accessed 9 June 2017; LiMA Reports, Reject Photographing the Ceremony (拒絕攝祭) (2014) <https://www.youtube.com/watch?v=r4hBhG4hckI>.

Even before the enforcement of the Protection Act these controversial situations urged the tribes to make rules to regulate filming. Many tribes published a notice in the period of their important ceremonies to regulate visitors' use of cameras. Some tribes required visitors to apply in advance if they wish to take photos of ceremonies. Moreover, some tribes, such as the *Kiwit* tribe, have developed a contract format for a photographer to sign when seeking the tribe's admission. The *Kiwit* tribe's agreement[115] includes several innovative articles regulating the use of photos and recordings, including (1) the recording and photographing of the tribe's ceremony shall be approved in advance by the tribe; (2) a copy of recording or photo shall be sent to the tribe within 6 months and shall be kept in the tribe's museum; (3) the copyrights shall be owned jointly by the tribe and the recorder/photographer; (4) six per cent of the income earned from these records, photos, or films will be shared by the tribe; (5) before publishing their works, the authors of recordings and photographs shall confirm with the tribe that their report and interpretation of tribal culture is correct.

The tribe's regulations for visitors are often different from the regulations for their own inhabitants. For example, the *Kinaloka* tribe allows their inhabitants to use modern media to record their ceremony. *Angay* from the *Kinaloka* tribe explains their agreement with the insider's filming during the ceremony:

[115] For the original texts, see: 'The Kiwit Tribe: Invitation and Regulations' <http://kiwit.apc.atipd.tw/invite> accessed 17 September 2018.

> Our people will not do anything harmful to our tribe. The video records can be the remembrance and reminder. Through these videos, we can find the defects of the ceremony and improve it the next years. This year I found out from the video recording that the women's headdresses are not consistent with each other.[116]

The opinion of the *Kinaloka* tribe matches that of the Protection Act, which follows 'internal protections' and 'external restrictions'[117]. Internal protections are supported by two articles of the Protection Act: first, the TCE holder owns the exclusive property rights and moral rights of TCEs (see Article 10, Paragraph 1), and second, indigenous people are entitled to use any profit from the TCEs of their own ethnic groups, tribes or the indigenous peoples as a whole and shall not be subject to the limitations prescribed in the Protection Act (see Article 10, Paragraph 4[118]). When tribal members use their own TCEs, they are not regulated by the state's law. It does not mean that TCEs are available for free to tribal members, because insiders are regulated by tribal regulations and customs.[119] Therefore, the internal protection consists of two layers: first, the assurance that tribal

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[116] LiMA Reports (n 114).

[117] I borrow Kymlica's idea, but employ it in the opposite way. Kymlicka proposes the idea of 'internal restrictions' and 'external protections' to argue how an individual within a minority group claim his or her cultural group right against the state's control but simultaneously enjoy the individual rights under the liberal state. The distinction between internal restrictions and external protections is crucial to his liberal defence of group-specific rights for minorities. See: Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press 1995) 35–44.

[118] Article 10, Paragraph 4 of the Protection Act: Indigenous individuals are entitled to use and profit from the TCEs of their own tribes, peoples or the indigenous peoples as a whole and shall not be subject to the limitations stipulated in Article 14.

[119] *Sui generis* TCEs are often described as 'limited commons property' regimes, 'with property available for free to those inside, but at a price to those outside.' See: Anupam Chander and Madhavi Sunder, 'The Romance of the Public Domain' (2004) 92 California Law Review 1331, 1363–1364; Carol M Rose, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems' (1998) 83 Minnesota Law Review 129, 155. However, the description of 'free use' or 'commons' inside the group often ignores the fact that tribal customs effectively control the tribal member's use of TCEs.

individuals are waived from the state law's control; second, the recognition of the parallel status of indigenous peoples' laws and rules.

On the other hand, external restrictions mean that non-tribal members cannot use and profit from the TCEs before obtaining the tribe's prior informed consent. Therefore, the tribe's authorisation is at their discretion, and the tribe can apply different rules of authorisation to their friends, visitors and researchers.

Therefore, documentation and registration according to the Protection Act symbolise two kinds of resistance with regard to digitalising indigenous people's TCEs. The first is that the Protection Act provides a platform for indigenous peoples to make their own documentation. As discussed in Chapter 6, this is the resistance against the modern state's long denial of their local memory and oral history. Second, the Protection Act can provide a tool to resist the outsider's unauthorised copy, documentation, and misinterpretation of the tribe's culture and history. This is what we call documentation preventing unauthorised documentation.

7.4.2 Documentation as Customary and Non-Customary use

According to Article 2 of the WIPO Draft Articles, the definition of 'use' and 'utilisation' means utilisation beyond the traditional context. The WIPO Draft Articles define a boundary between traditional and non-traditional use of TCEs and aim to 'control ways

in which their traditional cultural expressions are used beyond the traditional and customary context':[120]

> ["Use"]/["Utilization"] means
> (a) where the traditional cultural expression is included in a product:
> (i) the manufacturing, importing, offering for sale, selling, stocking or using the product **beyond the traditional context**; or
> (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it **beyond the traditional context**.
> (b) where the traditional cultural expression is included in a process:
> (i) making use of the process **beyond the traditional context**; or
> (ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or
> (c) the use of traditional cultural expression in research and development leading to profit-making or commercial purposes.[121]

In addition, according to the definition in Article 4 of 2002 Pacific Model Law, 'customary use means the use of traditional knowledge or expressions of culture in accordance with the customary laws and practices of the traditional owners.' Article 5 suggests that 'the customary use of traditional knowledge or expressions of culture does not give rise to any criminal or civil liability under this Act.' It also adopts the binary distinction between customary and non-customary use.

However, the following cases illustrates that the dichotomy between Western-style (non-customary) documentation and traditional style (customary) preservation can be

[120] WIPO, 'The Protection of Traditional Cultural Expressions: Draft Articles, Rev.2 WIPO/GRTKF/IC/34/6' (2017), Article 1, Alt 1.

[121] ibid, Article 2. (Emphasis added).

questioned. The following two cases illustrate that customary and non-customary documentation are fluid and constructed from each other.

7.4.2.1 Documentation Revives Living Culture

Documentation is mostly categorised as the non-customary way of preservation and is often regarded as part of colonial projects. It is argued that museums and archives 'acted as repositories of empire…They attempted to impose a standard rational order that legitimised colonial narratives of discovery, explorations and civilizing progress. Items were taken from their original contexts and placed, re-contextualised…to support these narratives.'[122]

Recently, the participation of indigenous people in the process of documentation has been discussed and encouraged in order to compensate for the damage caused by the colonial documentation projects and to balance the relationship between the state and indigenous communities. In 2011 *International Technical Symposium on Intellectual Property and Sustainable Development: Documentation and Registration of Traditional Knowledge and Traditional Cultural Expressions*, WIPO especially mentioned that the experiences of Egypt, Fiji, India, Oman and Peru can provide abundant evidence of indigenous peoples' participation in documentation, which can inform international communities.[123] In

[122] Eric Kansa, 'Indigenous Heritage and the Digital Commons' in Christoph Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International 2009) 222.

[123] WIPO, 'Submission by Oman: Report on The International Technical Symposium on Intellectual Property and Sustainable Development: Documentation and Registration of Traditional Knowledge and Traditional Cultural Expressions WIPO/GRTKF/IC/19/INF/10' (2011) 4.

addition, Taiwan's cultural documentation shows how a TCE that was recorded in non-customary way can, after the indigenous peoples' determination, be transformed back and forth between the customary and non-customary frameworks. The dynamic transformation conducted by the *Kavalan* people[124] in Taiwan is analysed in this section.

In 1987, the *Kavalan* people in Hualian County were invited to a performance event, "the Night in Fongbin" (豐濱之夜), organised by the government. At that time, the *Kavalan* people had been striving for the government's recognition of their *Kavalan* identity for decades. They were eager to present their cultural specialty in the performance, but realised they did not have traditional costume to wear. Ngolan, the daughter of the leader of the *Kavalan* rectification movement, obtained a photo of a traditional costume from the Department of Anthropology of National Taiwan University. Based on the photo and the elder's memory, they produced a black-and-white style of traditional costume and wore it to perform their traditional curing ceremony on the stage.[125]

Later, Ngolan found out that a genuine *Kavala*n's traditional bridal skirt had been collected by Dr George Leslie Mackay, who was the first foreign Presbyterian missionary

[124] The Taiwan government originally divided indigenous people 'into nine ethnic groups to reduce administrative complexity.' However, *'Kavalan* people were not listed under any of these official categories, and were either registered as Han people or plains aborigines, as the *Kavalan* who lived in eastern Hualien often had *Amis* spouses. In the late 1980s came the awakening of the Kavalan's ethnic awareness in Sinshe Village, Fongbin Township, Hualien County: the villagers worked actively to restore their ethnic name through various cultural and political activities. After more than one decade, finally in December, 2002, the…government declared the Kavalan to be the eleventh ethnic group in Taiwan.' Quoted from 'Kavalan' (*Digital Museum of Taiwan Indigenous Peoples*) <http://www.dmtip.gov.tw/Eng/Kavalan.htm> accessed 3 September 2017.

[125] Ngolan, 'A Journey of Reconstructing Kavalan's Traditional Bridal Skirt (復織噶瑪蘭族傳統新娘裙的心路)' [2015] Journal of Indigenous Documents (原住民族文獻) 31, 31.

arriving the Northern Taiwan in 1871.[126] The skirt is preserved in the Canadian museum to which Dr Mackay's collection of Taiwanese indigenous peoples' artefacts had been donated.[127] A professor from the Department of Anthropology of National Taiwan University took a photo of this traditional bridal skirt in Canada and sent the photo back to Ngolan. Using the photo as a guide, Ngolan spent several years to successfully reconstruct the weaving patterns of the *Kavalan* bridal skirt.[128] Currently *Kavalan* people often wear the costume with the special weaving patterns to represent their cultural identity in their ceremonies and in official performance events. The *Kavalan* rectification movement was also successful after more than a decade of struggles: in 2002, the government declared *Kavalan* to be the eleventh indigenous people in Taiwan.

Finally, in 2012, the *Kavalan* people joined the mooting programme of the Protection Act and applied to register the bridal skirt that had been revived by referring to documentation of the foreign missionary, museum, and anthropologists, and will be documented again in registers of the Protection Act. The application is currently under the Council of Indigenous Peoples' review.

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[126] Clyde R Forsberg Jr. (ed), *The Life and Legacy of George Leslie Mackay: An Interdisciplinary Study of Canada's First Presbyterian Missionary to Northern Taiwan (1872 – 1901)* (Cambridge Scholars Publishing 2012) 3–11.

[127] Chia-yu Hu, 'Museums, Anthropology, and Exhibitions on Taiwan Indigenous Peoples: The Historical Transformation on Settings of Cultural Representation (博物館、人類學與台灣原住民展示—歷史過程中文化再現場域的轉形變化)' (2006) 66 Journal of Archaeology and Anthropology (考古人類學刊) 94, 97–98.

[128] Ngolan (n 125) 32–34; TITV, 'Using the Museum's Collections, Pingpu Peoples Revitalise Their Culture (善用博物館收藏文物 平埔各族復振文化)' *TITV* (10 April 2017) <http://titv.ipcf.org.tw/news-28968> accessed 30 August 2017.

In *Kavalan*'s case, the revival of traditional bridal skirt was from non-customary documentation to customary use, and then reverted back to non-customary documentation/registration. From a contemporary perspective the initial documentation and collection of *Kavalan*'s traditional costume without the local community's prior consent is an example of unethical research and collection. Nevertheless, the *Kavalan* people transformed unethical documentation into the power of rectification movement and cultural revival.

The distinction of preservation and IP protection is fluid in this case. By recognition of their coevalness and parallel sovereignty, indigenous peoples' power can maintain, break, reconstruct and negotiate the boundaries between the state and indigenous peoples, between museums and local communities, between researchers and people being researched. It is indigenous peoples' living culture and their involvement that can become the power to prevent documentation from being a harmful tool to the local community. It can also cure the problems of unethical documentation in the past by taking more bottom-up actions and having continuous negotiation with researchers and the modern state.

7.4.2.2 Documentation <u>is</u> Living Culture

Finally, the *Kayapo* tribe's[129] case further suggests that sometimes, ***documentation is living culture***: the conventional (and Orientalist) distinction between Western-style

[129] The Kayapo tribe's territory is on the Central Brazilian plateau. *Kayapo* call themselves 'Mebêngôkre', which means 'the men from the water hole/place.' See: 'Mebêngôkre (Kayapó) - Povos Indígenas No Brasil' <https://pib.socioambiental.org/en/Povo:Meb%C3%AAng%C3%B4kre_(Kayap%C3%B3)> accessed 1 August 2018.

(non-customary) documentation and traditional style (customary) preservation can be challenged.

In 1985, three Brazilian media specialists brought the first camera to the *Kayapo* tribe and the first *Kayapo*-edited video was produced.[130] Turner observes the video recording of their rituals and political meetings, which was produced by *Kayapo* camerapersons, and concludes that *Kayapo* tend to use their own style of filming, for example, 'long shots, slow cut, and alternating panoramic and middle-range close-ups of collective activities such as ceremonial performances and political meetings, while avoiding extreme close-ups of individual faces.'[131]

Additionally, for *Kayapo*, the replications of dance and songs in the ceremony are regarded as a social form. Moreover, from the *Kayapo*'s perspective, repeated performances symbolises supreme beauty. Terence uses the video produced by a *Kayapo* cameraman and editor, Tamak, as an appropriate case to show the perfect replications. Tamak's video, which records Kubenkakre village's *Mebiok* (man's naming ceremony), shows the repetition of every performance in the ceremony. Therefore, Terence contends, Tamok's video 'replicates, in its own structure, the replicative structure of the ceremony itself, and this itself creates "beauty" in the Kayapo sense.'[132] He argues that the process

[130] Turner (n 89) 79.

[131] ibid 82.

[132] ibid 83.

of *Kayapo*'s video-making process has been mediated with *Kayapo*'s cultural concepts, categories and forms.[133]

Finally, representation and mimesis are also popular in *Kayapo* culture. In their ritual drama, they will imitate and represent the battles between *Kayapo* warriors and Brazilians. Terence argues that 'representation, far from being an exclusively Western project foisted on the *Kayapo* through the influence of Western media, is as *Kayapo* as manioc meat pie.'[134]

Therefore, WIPO's definition, which sees documentation as 'non-customary use' and far from 'living culture' is not always true. When documentation by modern media is used commonly by indigenous peoples, the boundary between customary and non-customary documentation has been blurred.

7.5 Moving on

As we mentioned in this chapter, dynamic negotiation can be found in the process of revitalisation of Taiwanese indigenous peoples' identities and culture. Indigenous peoples' experience before the enforcement of the Protection Act shows that they were already familiar with cultural negotiation with the government. Furthermore, negotiation between the modern state and indigenous peoples will continue in the process of registration under the Protection Act. The process of application becomes an opportunity

[133] ibid 82.

[134] ibid 84.

for indigenous peoples to rebuild traditional decision-making processes, to survey their own oral history, to practice their self-government and finally to build a site of memory in registers.

However, we cannot romanticise indigenous people's resistance and negotiation. The Protection Act and its registers still face many challenges, and they have to continue to be negotiated, revised and practised. The next chapter will analyse the government's bureaucratic and inefficient review process and explore the possibility of revising the process in order to secure indigenous peoples' parallel sovereignty and negotiation position.

Part 4: Inefficient Review Process and Suggested Improvements

8 Cross-reference: International, Regional, National legislations and Local Customs

This chapter will examine how the efficiency of governmental review influences a tribe's cultural life. In some cases the consequences are good (see Section 8.1.2), but other cases show, at best, the public's ignorance regarding the Protection Act and, at worst, intentional infringements encouraged by the inefficiency of the registration process (see Section 8.1.3). Therefore, the suggestion of revising the Protection Act is explored in Section 8.2 in order to maintain registration as the negotiation platform and respect TCEs' hybridity and indigenous peoples' sovereignty.

8.1 The Government's Slow-Paced Examination

8.1.1 Paperwork Obsession and Ignorance of Customs

Section 7.3 uses Taiwan's seven registered TCEs to show the possibility of a cultural minority's negotiation and to recognise indigenous peoples' power to resist the colonial IP law and the denial of coevalness under the structure of modern law. However, the

process of examination and approval, controlled by the Council of Indigenous Peoples, is still a huge challenge for Taiwanese indigenous peoples' claims of TCEs.

After filing applications, indigenous peoples should wait for their applications to be reviewed and approved by the Council of Indigenous Peoples. The review of the Council of Indigenous Peoples is not efficient. Of 120 applications filed between 2015 and 2018, only 19 applications have been approved to register during three years of examination.

Worse than the government's rejection is that its ignorance and inefficiency lead to uncertainty. Reviewers and the Council of Indigenous Peoples are obsessed about the details of paperwork in the process of application. In the process of examination of application, many reviewers tend to require more evidence from applicants to prove their cultural specialties, which will delay the reviewing process. Moreover, some opinions from the review committee show misunderstandings of the purpose of the Protection Act; they say, for example, that ceremonial songs should be recorded by the staff notation (as the *Seediq* case described in Section 4.3.2) or the recording quality is not good enough for inclusion on a register.

Sometimes the bureaucratic practice also ignores the custom of living cultures. For example, the *Saisiyat* people understood their tribal customs and the variety of melody of their worship songs in different tribes, so decided to register only the lyrics of worship songs of *Pasta'ay*. But in the pre-review meeting, the examiners demanded a complete video recording of the tribe's performance of the worship songs. However, the worship

songs for *Saisiyat* culture are extremely sacred, so they cannot be sung outside the *Pasta'ay* ceremony.[1] According to the tribe's taboos and customs, performance of the worship songs in other occasions rather than in the ceremony will cause severe punishment to the tribal members. It is also doubtful whether they can record their songs by means of contemporary technology.[2]

The inefficient review process and unreasonable requirements imply refusing indigenous peoples' negotiation and rights to narrate, which is against the main purpose of protecting TCEs. The aim of the Protection Act should be to recognise indigenous peoples' cultural rights and self-government, but the reviewers' unreasonable demands, ignoring the local customs, will result in the failure of negotiation and resistance of indigenous peoples in the registration.

Although some negotiations between commercial companies and the tribes are ongoing before these applications are approved by the government, some TCEs were misappropriated without any consent from the tribe, owing to the delayed process of registration. The following will discuss the tribe's negotiation with the outsiders, including cases with good outcomes and cases with bad outcomes. Following that, the

[1] See the comment of a member of the *Saisiyat* people: Feng Shun-En (風順恩), 'Reply: Regarding the Preview Meeting' (2017) <https://www.facebook.com/titicoffice/posts/1697878723852636> accessed 9 April 2018.

[2] *Pasta'ay* is the most sacred ceremony for the *Saisiyat* people. Any negligence may cause severe punishment from the short people, who are the spirits worshipped in the ceremony of *Pasta'ay*. See: Tai-Li Hu, 'Cultural Authenticity and Performances: Experience from Saisiyat and Paiwan (文化真實與展演：賽夏、排灣經驗)', *Cultural Performances and Indigenous People in Taiwan (文化展演與台灣原住民)* (Linking Publishing 2003) 423–437.

next section will look at the solution to these problems, with reference to other legal resources.

8.1.2 Successful Cases: License and Management before Registration

There have been some good outcomes from negotiation about licensing TCEs before the final decision of the Council of Indigenous Peoples. Before indigenous people's applications were approved, news regarding the Protection Act and applications attracted public attention. Recently, two tribes began negotiation with people who want to use their TCEs even though the tribes' rights have not yet been officially granted. The mutual negotiation and agreement prior to the confirmation by state's law may match what Coombe has observed: 'Attempts to construct new regimes of state-based property rights lag far behind traditional customs, contemporary mores, and, particularly, the new practices, protocols, ethics, and relationships of mutual respect and recognition that have been provoked by cultural property claims.'[3]

The first case is the *Seediq* people and the heavy metal band *ChthoniC* (閃靈樂團). In 2015, the internationally well-known band *ChthoniC* signed a memo of understanding with the *Seediq* people regarding the licensing of *Seediq*'s TCEs. It was the first case after the Protection Act and its by-laws were enacted in 2015. Both parties held a press conference, in which *ChthoniC* apologised for their misuse of *Seediq* culture in the title and the cover

[3] Rosemary J Coombe, 'The Expanding Purview of Cultural Properties and Their Politics' (2009) 5 Annual Review of Law and Social Science 393, 407.

design of their album '*Seediq* Bale' in 2005.[4] The lead singer of *ChthoniC*, Freddy Lim (林昶佐), introduced his understanding of the Protection Act to the public: 'The Protection Act is to build an institution for the artist to negotiate the authorisation with indigenous peoples prior of using their TCEs… It is the respect of indigenous peoples' collective rights.'[5] The process of negotiation and Freddy Lim's apology was very educational to the public.

The *Seediq* people also established 'the Committee of the Common Fund for *Seediq*'s Traditional Cultural Expressions' (賽德克族智慧創作保護共同基金管理委員會) after the enforcement of the Protection Act, even though they had not been granted any rights of TCEs at that time. The way they organised the committee is that they selected fifteen members representing the three linguistic groups of *Seediq* people. The Committee of the Common Fund for *Seediq*'s Traditional Cultural Expressions was built in advance to emphasise that if non-*Seediq* people would like to use *Seediq*'s applied TCEs, they should negotiate with the committee in advance.[6]

A second case of negotiation and license involved the *Malan* tribe and SONY Music Entertainment. The *Malan* tribe is the holder of the famous *Amis* ancient tune 'the drinking

[4] Ting-Fang Hsiao, 'Freddy Lim Apologised for Misappropriation of Seediq Culture in His Album (專輯誤用賽德克文化 林昶佐道歉)' *Liberty Times* (21 December 2015) <http://news.ltn.com.tw/news/politics/breakingnews/1546957> accessed 7 April 2018.

[5] Freddy Lim, 'Seediq x ChthoniC' (2015) <https://www.facebook.com/limfreddy/posts/431034093774494:0> accessed 7 April 2018.

[6] TITV, 'Seediq Established the Committee That Prevents from TCE Infringement (防智創遭侵權 賽德克族設管委會把關)' TITV (25 June 2016) <http://titv.ipcf.org.tw/news-22005> accessed 29 March 2017.

song', which was misappropriated by the European band and led to the famous legal dispute as described in Section 2.3.1. In 2016, SONY Music wanted to issue a new pop-song album sung by the Taiwanese indigenous singer, A-Lin. Three ancient songs of the *Malan* tribe were to be adopted in this album, so SONY Music wanted to obtain a license from the *Malan* tribe. Therefore, the *Malan* tribe organised the '*Valangaw* Culture and Copyright Committee' (大馬蘭文化著作權委員會) and held tribal meetings with the representative of the SONY Music Entertainment in order to negotiate their license agreement.[7] Before the *sui generis* right being granted, the term 'copyright' is used to facilitate the public's understanding, even though the ancient songs cannot be protected by copyright. The chairman of *Valangaw* Culture and Copyright Committee, Fu-Ching Luo, described how their views were changed in the face of capitalism: 'We did not pay enough attention to the tribe's common interests, because we were "privatised" (by capitalism). When we only care about ourselves, the group rights with relevant to our IP are ignored.'[8] For him, it was a good opportunity for the tribe not only to negotiate the commercial music industry, but also to negotiate the tribe's tradition, their identity and group rights.

The 'copyright' committees and the license agreements established before the state's approval symbolise a further step to their self-management. Moreover, these two cases show that commercial record companies are more willing than other commercial companies to negotiate a license agreement with the tribe before the final result of

[7] TITV, 'Valangaw's Ancient Tunes Will Be Adapted in A-Lin's New Album (A-Lin 將發新專輯 歌曲收錄馬蘭古謠)' *TITV* (15 November 2016) <http://titv.ipcf.org.tw/news-25413> accessed 29 March 2017.

[8] TTIV, 'Voice of Eastern Coast, Episode 158 (東海岸之聲，第 158 集)' (*TITV*, 2017) <http://titv.ipcf.org.tw/program-4-158> accessed 27 March 2018.

applying TCE registration. The international legal dispute between the *Amis* singer *Difang* and the German band *Enigma* has been a lesson for the music industry, which may be the reason why the music industry prefers to sign the license agreement in advance to avoid the uncertainty of law.

8.1.3 Bad Cases: Encouraging Misappropriation

The cultural appropriation of non-registered TCEs seems 'legal' according to the Protection Act. As Article 7 prescribes '...starting from the date of registration, the applicant shall obtain the exclusive right to use such intellectual creations', many people assume that if TCEs are not registered, such TCE can be freely appropriated.[9]

The *Tao* People's *tatala* (balangay), which has been under the review of the Council of Indigenous People, is a well-known case of being appropriated without any prior consent. The original *Tao*'s *tatala* can be seen in Figure 9.

[9] Chung-Hsin Chang, 'The Past and the Future of the Protection of Indigenous Peoples' TCEs (原住民族傳統智慧創作保護之過去與未來)' in Chen-Fa Tung (ed), *The Future of the Past: Selected Papers from the 2016 Conference of Creation and Protection of the Indigenous Traditional Knowledge* (College of Indigenous Studies, National Dong Hwa University 2016) 20–23.

Figure 9: The *Tao* people's *tatala* (Photo by Sinamat.[10] Authorised by CC-BY-NC-ND.)

The perfect structure and beautiful design of *Tao*'s *tatala* was so attractive that many infringements happened. Two recent cases include China Airlines' misappropriation in the international competition of floats and a utility model patent of *Tao*'s balangay applied by a commercial company.

(1)China Airlines' Misappropriation

Without any prior consent of the *Tao* People, China Airlines[11] adopted the design of Tao's balangay to create the "Venture to Majestic Taiwan" float, which went on to win the 127th

[10] Sinamet, 'Orchid Island's "Ocean Award" Canoe Races (蘭嶼「海洋盃」拼板舟划船競賽)' (13 August 2011) <https://www.peopo.org/news/82099> accessed 29 March 2017.

[11] China Airline is a Taiwan-brand airline company with the name 'China' due to historical reasons.

International Rose Parade in Pasadena, California in 2016. China Airlines proudly announced it and explained the idea of their float design in its press release:

> The balangay, or plank-built boat, unique to Lanyu served as the main body. Electric simulation technology was used to make the boat look as if it was sailing across the sea. The float was also decorated with **the traditional totems of the Tao people including wave carvings and flying fish patterns**. **The eye motif, which looks like a gear wheel, in particular represents the eyes of the boat and wards off evil.** The "Flying Fish Festival" in Taiwan embodies respect for the natural environment as well as the embracing of ecological sustainability. It therefore complements China Airlines' longstanding support for green energy, environmental protection and sustainable development. (Emphasis added.)[12]

The balagay float was not designed only by China Airlines. In fact, China Airlines partnered with Taiwan's Ministry of Foreign Affairs and the Tourism Bureau, but the government and the commercial company never thought to ask for *Tao* people's permission in advance.

China Airlines's design and construction of *tatala* without permission violates *Tao*'s customs. Firstly, *Tao*'s *tatala* can only be built by following their customs and taboos. China Airlines carving traditional totems and the eye motif in the *tatala* is totally against the Tao's customs. The owner of *tatala* with carved totems should hold a traditional ceremony before the *tatala* can be used. If a family cannot afford the ceremony, its *tatala* cannot be carved.[13] Secondly, China Airlines (falsely) describes *Tao* culture in its press

[12] 'China Airlines Wins Top Prize at 2016 Rose Parade with The Traditional Beauty of Lanyu' (2 January 2016) <http://www.china-airlines.com/us/en/discover/news/press-release/Top-Prize-at-2016-Rose-Parade> accessed 29 March 2017.

[13] Ingrid, Jamie and Olin, 'Cover Story: Tovil No Pongso' [2015] *952 vazay tamo* 6.

release, 'the traditional totems of the *Tao* people including wave carvings and flying fish patterns'. However, according to tribal customs, flying fish cannot be carved in the *tatala*, because it is too *masyat* (beautiful) and too ostentatious for the humble *Tao* People. Doing so would cause evil to befall the whole family.[14]

Moreover, different *Tao* families have different designs of *mata no tatala* (eye motif). According to their customs, no one can copy another family's design of *mata no tatala.* If one family would like to use the other family's pattern, they have to exchange jewellery and cattle for the pattern. This *Tao* custom also shows that they have their own concepts of 'intellectual property' to 'license' their designs.[15]

(2)A Structure of Tatala Registered as a Utility Model Patent

In 2017, an innovation company, Chien Yi Innovation, successfully registered 'a structure of *tatala'* as their utility model patent. The company referred to Article 7 and Article 22 of the Protection Act to claim their rights should be legitimate.[16] Based on Article 7, as discussed above in the China Airlines case, Chien Yi Innovation argued that the *Tao* People could not have any right unless they had approval of registration from the modern state. Moreover, Article 22 prescribes that 'the provisions in the Protection Act do not affect the rights obtained by an exclusive user of intellectual creations or by a third party in

[14] ibid 8.

[15] ibid 7.

[16] UDN, 'Chien Yi Innovation Explains Their Controversial Patent Application of Orchid Island's Tatala (申請蘭嶼拼板舟專利惹議 千益公司說明原委)' (*UDN News*) <https://udn.com/news/story/7314/2251839> accessed 30 March 2017.

accordance with other laws', so Chien Yi Innovation claimed that they were the third party obtaining the utility model patent according to Taiwan's patent law.

Later, Chien Yi Innovation faced many people's protests, so they decided to renounce their utility model patent. But from the China Airlines case and the Chien Yi Innovation case, we can see that Article 7 of the Protection Act becomes a negative effect. People who misappropriate cultural symbols can refer to this Article and conclude that TCE owners cannot claim any right unless such TCE has been registered by the government.

Sinan Mavivo, a member of *Tao* people, questioned that the patent review system ignored indigenous peoples' voice: 'Why we have never been consulted in the government's review process even if the applied patent apparently involved indigenous people's culture and knowledge?' [17] Indeed, the question should be shifted from the tribe to the government. If we are prepared to ask the tribe why they did not claim their rights by the state's law, we should also be prepared to ask the government why they did not respect indigenous peoples' culture and parallel sovereignty. How could the government cooperate with China Airlines to build a float of *tatala* without consulting the *Tao* people? Upon receiving a patent application referring to indigenous peoples' TCEs, why did the Patent Bureau not think of respecting the Tao's custom and culture of building the *tatala*?

[17] TITV, *Taiwan Indigenous Perspectives Episode 159: How Do We Protect Indigenous Peoples' Traditional Cultural Expressions? (部落大小聲(159)蘭嶼拼板舟專利爭議—原住民族傳統智慧如何保護？)* (2017) <https://www.youtube.com/watch?v=t342d_OBAqY> accessed 30 March 2017.

These cases lead to an obvious question: how can the slow-pace of the review process be prevented from becoming an obstacle to indigenous peoples' claims of TCEs? A quick overview of legal analysis according to the Taiwan Constitution and the Protection Act will be presented here, but in order to facilitate indigenous peoples' power of negotiation and to respond to the hybridity of TCEs, a more detailed analysis and proposed revision of the registration system will be given in the next section.

As discussed in Chapter 5, the Protection Act should be understood based on the principle of multiculturalism and *sui generis* rights. It has been shown that *sui generis* rights support indigenous peoples' parallel sovereignty. The multicultural Constitution should respect and secure indigenous peoples' living culture and right to narrate. Applying multiculturalism to the interpretation of the Protection Act, Chu-Chen Huang suggests retrospectivity and coevalness should be recognised by the Protection Act. Therefore, Huang suggests that the rights protected under the Protection Act 'shall take effect retrospectively, which means there will be no vested rights for the current civil law IP which may contain indigenous people's registered TCEs.'[18] The retrospective effects can remind the outsider to negotiate the licensing of TCEs with the tribes before indigenous people files the application. It is also 'a necessary result of transformative justice.'[19] The retrospective effect is not universally accepted by all scholars,[20] but Huang's argument

[18] Chu-Cheng Huang, 'Legalizing Community Resources — Experiences Learned from Implementing the Indigenous Traditional Intellectual Creations Protection Act (ITICPA)' (2014) 1 The IAFOR Journal of Politics, Economics and Law 29, 32.

[19] ibid. Also see: Chu-Cheng Huang, 'Indigenous Intellectual Creations and Sui Generis: A Critical Interpretation of the New Protection Act for the Traditional Intellectual Creations of Indigenous Peoples (傳統智慧創作與特殊權利──評析「原住民族傳統智慧創作保護條例」)' (2010) 3 Taiwan Journal of Indigenous Studies 11.

[20] Some arguments reject the retrospective effect of *sui generis* rights, see: Chang (n 9).

reminds us that the different (and even conflicting) perspectives of time and property between modern IP law and indigenous peoples' customs should negotiate in the Protection Act. Moreover, legal interpretations of the Protection Act should not ignore the importance of indigenous peoples' sovereignty and justice.

Moreover, Chien Yi Innovation's arguement that Article 22 of the Protection Act[21] supports their rights according to Taiwan's patent law is not correct. The *ratio legis* for Article 22 of the Protection Act suggests that 'although the exclusive rights of TCEs will be protected by this Protection Act, the right owner can simultaneously choose any other laws (e.g. the Preservation of Cultural Heritage Act) to protect their TCEs.'[22] Therefore, Article 22 should be the clause to protect indigenous people's rights supported by other laws but it does not exclude their rights of TCEs by means of either patent laws or any other law.

Finally, according to the Protection Act, the Council of Indigenous Peoples is expected to play a more active role rather than act as an obstacle by endlessly expanding the administrative requirement of the process of review TCEs. For example, Article 8 of Regulations Governing TCEs prescribes, 'In the following cases, the Council of Indigenous Peoples may negotiate with indigenous peoples or tribes, and select the representative to apply to register: (1) a TCE is high value but has not applied by any indigenous tribe nor

[21] Article 22 of the Protection Act prescribes, 'the provisions in the Protection Act do not affect the rights obtained by an exclusive user of intellectual creations or by a third party in accordance with other laws'.

[22] Legislative Yuan, Agenda Related Documents, Yuan-Tzung-No.1722, Governmental Proposal No.10043 (立法院議案關係文書，院總第 1722 號，政府提案第 10043 號) 2005.

indigenous people, (2) a TCE is endangered, infringed or predicted to be infringed, so urgent registration is needed, and (3) indigenous peoples or tribes who can be applicants who no longer exist.' The responsibility of the Council of Indigenous Peoples is to find endangered or easily infringed TCEs and to assist the holders of TCEs to be protected by laws as soon as possible. It should not repeatedly examine unnecessary issues in the applications and slow down the development of indigenous peoples' self-government.

As mentioned in Chapter 7, indigenous people's experiences of registering TCEs suggests that the most important functions for them are recording their oral tradition, claiming their parallel sovereignty and maintaining the exclusive rights to describe and interpret their tradition and culture. Since registers and *sui generis* rights can be a new platform for indigenous people to negotiate with the modern state, in order to prevent the reviewers' bias and ignorance from creating unnecessary obstacles to the protection of TCEs, a revision of the legal effect of the application should be considered.

8.2 Suggested Revisions

In this section, suggested ways of revising the Protection Act are explored. Combining indigenous peoples' local experience as previously discussed, international and regional legal resources are compared and referred to in order to construct a better system of registration. The suggestions discussed in this section are conditional on the registration system being kept in the Protection Act. The automatic protection of TCEs without registration is hard to evaluate because the evidence related to Taiwanese indigenous peoples' experience is lacking.

8.2.1 The Regulation on the Period of Reviewing Applications

As shown by the cases outlined in Section 8.1, the delayed review process will encourage infringements. Therefore, the limitation of the review period regulated by laws becomes a tool to push the review process forward. Taiwan's regulation over the review period is ambiguous. There is no limitation prescribed in the Protection Act, so the Administrative Procedure Law and the Administrative Appeal Law are applied to claim that the limitation of review period is required by the principle of administrative procedure.

Taiwan's registration system of TCEs was significantly informed by Panama Law 20 and its Executive Decree. However, the Protection Act does not adopt Panama's regulation on the period of reviewing the applications. In this section, Panama's registration and review period will be summarised, to consider whether a complete regulation of the review period can improve the inefficient review process.

(1) Panama's Registration and Limitation of Review Period

Panama Law 20 introduces a registration system of granting rights relevant to TCEs. Panama Law 20 recognises three types of TCEs that can be protected. First, traditional indigenous dresses worn by the *Kuna*, *Ngöbe* and *Buglé*, *Emberá* and *Wounaán*, *Naso* and *Bri-bri* peoples would be protected (see Article 3). Second, Article 4 of Panama Law 20 recognises the *sui generis* right of 'indigenous peoples' musical instruments, music,

dances or performances, the oral and written expressions that are part of their traditions and make up their historical, cosmological and cultural expression'. Third, the protection of Panama Law 20 includes 'indigenous peoples' traditional artistic and work tools, as well their technique for their manufacture, expressed in national raw materials, through the elements of nature, their processing, preparation, combination of natural dies, including the ivory palm and semi-precious wood (cocobolo and nazareno) carvings, traditional baskets, nuchus, beads, leather bags, and all other traditional cultural expressions' (see Article 5).

According to Article 4, requests for registration of the collective rights shall be made by indigenous general congresses or traditional authorities to the Directorate General of Registration of Industrial Property of the Ministry of Commerce and Industry ('DIGERPI'), or to the National Copyright Directorate of the Ministry of Education, as appropriate, for approval and registration. Additionally, Article 3 prescribes that the technical description of the traditional forms of dress shall be recorded in their respective registers. Therefore, registration authorities are diverse.

Registers have the power to substantially examine indigenous peoples' applications. For example, Article 9 prescribes that 'DIGERPI shall create the position of collective indigenous rights examiner, to protect the IP and other traditional rights of indigenous peoples. This public servant shall be empowered to examine all applications made to DIGERPI in relation to the collective rights of indigenous peoples, to prevent registrations in violation of this Act.'

Executive Decree No.12 prescribes the limitation on the period of examining applications. The review period of 30 days is for the registration authorities to examine if any required document has been omitted, in order that the filing can be completed within a period not exceeding six months following the filing of the application, as Article 8 prescribes:

> The registration authorities designated by the Law shall satisfy themselves, within a period of 30 days of the filing of the application, that it contains all the submissions required under the foregoing Article. Where any required particular or document has been omitted, the general congress(es) or traditional native authority (authorities) … of the indigenous people or peoples that have applied for registration shall be informed accordingly, in order that the filing may be completed within a period not exceeding six months following the filing of the application. Following that date they shall file a new application with the documentation in question. Where the submissions required have been made and verified by the authorized national agencies, registration of the collective right applied for shall proceed.

(2) Taiwan's Registration and Limitation of Review Period

In Taiwan, theoretically, a lawsuit can be filed by the applicants requesting the registers to complete their review process. The Protection Act does not prescribe the limitation of the review period, but according to Article 51 of Taiwan's Administrative Procedure Act,[23] the processing time period is assumed to be two months. Therefore, if the processing time exceeds the period which the Administrative Procedure Act provides, the applicants can

[23] Article 51 of Taiwan's Administrative Procedure Act, 'unless otherwise provided by law, an administrative authority shall establish and announce by a public notice the time periods required for processing various categories of applications filed by the people under law and regulations.

In the absence of processing time period established and announced under the preceding paragraph, the processing time period shall be two months. Where an administrative authority is unable to complete the process within the time period established in pursuance of the two preceding paragraphs, the process may be extended to the extent of the original processing time period, but for once only.'

file the lawsuits to demand the Council of Indigenous Peoples' decision, according to Article 2, Paragraph 1 of the Administrative Appeal Act, which states: 'Anyone whose right or interest was unlawfully or improperly damaged by a central or local government's inaction to his application during the period stipulated by this Act is entitled to file an administrative appeal.'

However, in practice, it is difficult for indigenous peoples to file such a suit based simply on the concrete limitation of review period. In fact, there are few tribes that are willing to sue the Council of Indigenous Peoples. The Council of Indigenous Peoples is not like the IP office, which is often in the position facing the applicant's objections and appeals. The Council of Indigenous Peoples is the highest administrative branch in charge of indigenous peoples' affairs. There are six departments dealing with the most important issues of indigenous peoples: planning, education and culture, social welfare, economic development, public construction, and land administration.[24] Indigenous peoples' everyday lives deeply depend on social welfare and funding distributed by the Council of Indigenous Peoples, so they worry that suing the Council of Indigenous Peoples will influence their applications for social welfare in the future. Additionally, the judicial system is not the system which indigenous people generally use to solve their problems. For example, among the judgments made in 2017, there was no case in which the Council of Indigenous Peoples was the defendant in the Taipei High Administrative Court (台北高

[24] The Council of Indigenous People, 'About CIP' (*The Council of Indigenous Peoples*) <http://www.apc.gov.tw/portal/cateInfo.html?CID=FF1F9045E15A05A7> accessed 27 August 2017.

等行政法院),[25] and only one case in which it was the defendant in the Taipei District Court (台北地方法院).[26] However, in the case of the Taipei District Court, the plaintiff was not an indigenous person but a supplier of computer equipment (and it lost the case).[27] It is clear from court records that it is rare for indigenous peoples to file a lawsuit against the Council of Indigenous Peoples.

Two recommendations for registration in the report of the Convention on Biological Diversity (CBD) can be referenced for possible improvements to the design of registration. First, registers should not place undue burdens on indigenous people, and 'the use of registers should be proportional to the problems that the registers are expected to resolve'.[28] Second, although we recognise the importance of indigenous people's full participation in the TCE protection system, their participation should not be a prerequisite for protection of their TCEs.[29] The unlimited waiting period and impossible lawsuits have provided disproportionate burdens for Taiwan's indigenous people and are

[25] If a person wants to file a lawsuit regarding the public law matter against the Council of Indigenous Peoples, the Taipei High Administrative Court is in the first instance in charge of such a lawsuit.

[26] If a person wants to file a lawsuit regarding the Civil Code matter against the Council of Indigenous Peoples, the Taipei District Court is in the first instance in charge of such a lawsuit.

[27] See: No. 105-Sue-1035 (105 年度訴字第 1035 號) of the Taipei District Court. It was a case in which the supplier of computer equipment sued the Council of Indigenous Peoples for payment of liquidated damage according to the supply agreement between both parties.

[28] Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(J) and Related Provisions of the Convention on Biological Diversity, 'Considerations for Developing Technical Guidelines for Recording and Documenting Traditional Knowledge and the Potential Threat of Such Documentation UNEP/CBD/WG8J/5/3/Add.2' (2007) para 48.

[29] In this report, it suggests that 'recognizing that the documentation and recording of traditional knowledge should primarily benefit indigenous and local communities and that their participation in such schemes should be voluntary and not a prerequisite for the protection of traditional knowledge.' See: ibid 11.

harmful to indigenous peoples' cultural rights and sovereignty. The two principles will be considered further to answer the question: in Taiwan's context, how should the registration system work efficiently and simultaneously guarantee the parallel sovereignty of indigenous peoples? This will be explored in the next two sections.

8.2.2 Application Filed by Potential Users?

There is another style of registration system relating to the legal protection of TCEs. It is when the potential users, rather than the owners of TCEs, file the applications to the registrar. For instance, the Pacific Model Law and Peruvian Law 27811, Regime for the Protection of Indigenous Peoples' Collective Knowledge Associated with Biodiversity ('Peru Law 27811') adopt this different registration system.

According to Article 15 of Division 2 (Applications for use and identifying traditional owners) of the Pacific Model Law, the prospective user of TCEs shall either apply to the Cultural Authority[30] or contact the owners of TCEs in order to obtain the owner's prior

[30] According to Article 36 of the Pacific Model Law, the Minister should designate an existing or new body to perform the functions of the Cultural Authority. The functions of the Cultural Authority include the following (see Article 37 of the Pacific Model Law):

(a) to receive and process applications;

(b) to monitor compliance with authorised user agreements and to advise traditional owners of any breaches of such agreements;

(c) to develop standard terms and conditions for authorised user agreements;

(d) to provide training and education programs for traditional owners and users of traditional knowledge or expressions of culture;

(e) to develop a Code of Ethics in relation to use of traditional knowledge and expressions of culture;

(f) to issue advisory guidelines for the purposes of this Act;

and informed consent. Either way requires the registration application by potential users. In the former way, prospective users should apply and register their demand of authorisation to the Cultural Authority. In the latter circumstance, although prospective users can personally contact the holder of TCEs and negotiate the agreement with the holder, potential users are still required to register their agreement with the Cultural Authority.

In the first circumstance, Article 15(1) of the Pacific Model Law states: 'A prospective user of traditional knowledge or expression of culture for a non-customary use (whether or not of a commercial nature) may apply to the Cultural Authority to obtain the prior and informed consent of the traditional owners to use the traditional knowledge or expressions of culture.' The enacting country should set the review period of the Cultural Authority,[31] and according to Article 15 (4), if the Cultural Authority does not finalise the application within that period, the traditional owners are deemed not to have consented to the proposed use.[32]

(g) to liaise with regional bodies in relation to matters under this Act;

(h) to maintain a record of traditional owners and/or knowledge and expressions of culture;

(i) if requested to do so to provide guidance on the meaning of customary use in specific cases;

(j) such other functions as are conferred on it by this Act.

[31] Article 15(3) of the Pacific Model Law: 'The Cultural Authority must finalise the application in accordance with this Part within [Enacting country to insert time period].'

[32] Article 15 (4) of the Pacific Model Law: 'If the Cultural Authority does not finalise the application within the period mentioned in subsection (3), the traditional owners are deemed not to have consented to the proposed use.'

After the Cultural Authority receives the application, it must give a public notice, which includes:

> (a) give a copy of the application to those persons (if any) who it is satisfied are the traditional owners of the traditional knowledge or expressions of culture to which the application relates; and
> (b) publish a copy of the application in a newspaper having national circulation stating how interested persons may obtain a copy of the application; and
> (c) if appropriate, broadcast details of the application on radio or television stating how interested persons may obtain a copy of the application.[33]

The tribe or local community who claims to be owner of the TK should give a notice, either in oral or written form, to the Cultural Authority within 28 days upon the Cultural Authority's public notification (see Article 16(2)).[34]

The legal procedure after the tribes claim to be the owner of TCEs according to Article 16(2) is that the Cultural Authority should provide multiple functions to indigenous peoples and the potential users:

(1) Acting as the Examiner of TCEs

The qualification of the holders of TCEs is examined by the Cultural Authority. If the Cultural Authority 'is satisfied that it has identified all of the traditional owners, it must

[33] Article 16(1) of the Pacific Model Law.

[34] Article 16(2) of the Pacific Model Law: 'Any person who claims to be a traditional owner of the traditional knowledge or expressions of culture to which the application relates must advise the Cultural Authority within 28 days after the application is published or broadcasted (whichever is the later). The advice may be given orally or in writing.'

make a written determination containing such details as to identify the traditional owners,' according to Article 17 (1). However, if the owners of TCEs cannot be identified, 'the Cultural Authority must refer the matter to the persons concerned to be resolved according to customary law and practice or such other means as are agreed to by the parties.'[35]

(2) Acting as the Holder of TCEs

The Cultural Authority can determine itself as the holder of TCEs in order to perform the obligations and the rights prescribed in the Pacific Model Law, under the circumstances that (a) no traditional owners can be identified or (b) no agreement has been reached on ownership within the time period that the enacting country's national law demands.[36]

(3) Acting as the Mediator

In accordance with Article 20(1), after being notified with the potential user's application, 'the traditional owners must decide whether: (a) to reject the application; or (b) to accept the application and to enter into negotiations for a written authorised user agreement in relation to the application.'

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[35] Article 18 (1) of the Pacific Model Law: 'If the Cultural Authority is not satisfied that it has identified all of the traditional owners or that there is a dispute about ownership, the Cultural Authority must refer the matter to the persons concerned to be resolved according to customary law and practice or such other means as are agreed to by the parties.'

[36] Article 19 (1) of the Pacific Model Law: 'If the Cultural Authority is satisfied that: (a) no traditional owners can be identified; or (b) no agreement has been reached on ownership within the period mentioned in section 15(3) after the application was made; the Cultural Authority may, after consultation with the Minister, make a determination that the Cultural Authority is the traditional owner of the traditional knowledge or expressions of culture concerned for the purposes of this Act.'

When the owners make the decision, they must advise the Cultural Authority of their decision orally or in writing. (Article 20 (2)) Later, the Cultural Authority must advise the applicant in writing of the owners' decision (see Article 20(3)). The Cultural Authority here works as a **mediator** between the owner of TCEs and the prospective user.

(4) Acting as the Consultant

The Cultural Authority also acts as a **consultant**. It will review the agreement before such agreement takes effect, in accordance with Article 21 (1) of Pacific Model Law: 'Before entering into an authorised user agreement, the traditional owners must refer the proposed agreement to the Cultural Authority for its comments on the proposed terms and conditions of the agreement.' The Cultural Authority may also require a meeting of the owners and the potential user if it believes the potential user has not got the owner's informed consent, or the proposed terms and conditions do not sufficiently protect the owners' rights, according to Article 21 (2).[37]

(5) Acting as the Archives Institute

[37] Article 21(2) of the Pacific Model Law, 'The Cultural Authority may request the applicant and the traditional owners to meet with it to discuss the proposed agreement if the Cultural Authority is, after reviewing the proposed agreement, satisfied that:

(a) the traditional owners do not have sufficient information to make a full and informed decision about the proposed terms and conditions of the agreement; or

(b) the proposed terms and conditions of the agreement do not adequately protect the traditional knowledge or expressions of culture of the traditional owners.'

Finally, the Cultural Authority also acts as the **archives institute**. It has to keep the records of agreements of authorisation, according to Article 23 (3) of the Pacific Model Law.[38]

Aside from applying to the Cultural Authority, the second method to seek authorisation is that the prospective user directly negotiates with the owner of TCEs. According to Article 25 (1) of Pacific Model Law, 'nothing prevents a prospective user of traditional knowledge or expressions of culture from obtaining the prior and informed consent of the traditional owners without applying to the Cultural Authority.'

However, this method also requires the Cultural Authority to act as the archive institute. If both parties choose this way, the prospective user should report that it has sought the prior and informed consent of the owners of TCEs,[39] provide a copy of the proposed authorised user agreement between the prospective user and the traditional owners for comment,[40] and register the final version of authorisation agreement.[41] The prospective user cannot contract out of the obligation under the law. If a copy of the proposed

[38] Article 23(3) of the Pacific Model Law, 'The Cultural Authority is to keep a register of authorised user agreements. The register is to be in such form and contain such information as the Cultural Authority determines.'

[39] Article 25(2) of the Pacific Model Law: 'the prospective user must advise the Cultural Authority that the prospective user has sought the prior and informed consent of the traditional owners.'

[40] Article 25(3) of the Pacific Model Law: The prospective user must provide the Cultural Authority with a copy of the proposed authorised user agreement between the prospective user and the traditional owners for comment, and advice about other prospective traditional owners.

[41] Article 25 (4) of the Pacific Model Law: The prospective user must provide a copy of the signed authorised user agreement to the Cultural Authority to be entered in the register (refer subsection 23(3)) within 28 days after the agreement comes into force.

authorisation agreement is not provided to the Cultural Authority, the authorised user agreement is not valid.[42]

Both models of TCE's authorisation based on the Pacific Model Law require that the government directly intervenes to safeguard the TCE owners' interests. In the first model, the cultural authority determines who is the owner of TCEs and comments on the authorisation agreement before the agreement takes effect. Moreover, the decision of TCE holders, whether rejecting or agreeing the proposed authorisation, is advised by the Cultural Authority, rather than directly notified by the holders of TCEs. In the second model, although the potential users can negotiate with the holder of TCEs, the cultural authority has the power to comment on the agreement and register the final agreement. If prospective users do not submit the proposed agreement, the agreement is not legally binding. According to both models, the Cultural Authority acts as the examiner, the mediator between the owner of TCEs and the prospective user, the consultant and the archives administrator. The 'multi-functional' governmental institution intervening in local communities' self-discretion and determination will keep indigenous people relying on the government's decisions and will also create a heavy (and maybe unnecessary) burden to the government's budget and human resources.

If an inefficient administrative process is the problem to be solved, then applications from the potential users will not solve the problem. On the contrary, it creates more of a

[42] Article 25 (6) of the Pacific Model Law: 'The prospective user cannot contract out of the obligation under subsection (3). If a copy is not provided under subsection (3), the authorised user agreement is null and void.'

workload for the registration office. In addition, the system requires more human resources and money. As WIPO suggests, in the issue of documentation and registration of TCEs, the budget really matters. When we choose registration to recognise the rights of TCEs, the registration system will involve administrative staff, review committees or experts, and the maintenance of a register also requires investments in time and human resources.[43] Taiwan's case proves that the budget is an important issue. The Council of Indigenous Peoples does not invest sufficient human resources and time, or it invests resources in the wrong places and for the wrong people, so there are many applications waiting for review. We should take it seriously that the administrative agency's delay is violating the culture rights of indigenous peoples and postponing the practice of indigenous peoples' sovereignty. The complicated functions imposed by the government will worsen the inefficiency and delay, so applications being filed by potential users may not solve the efficiency problem of Taiwan's Council of Indigenous Peoples.

The model of the Pacific Model Law increases the extent of the government's control of indigenous peoples TCEs. It seems neutral to say that the Cultural Authority acts as a mediator between the potential users and the holders of TCEs. However, when the government determines the holder of TCEs, monitors every single agreement between the owner and the user, and even acts as the holder of TCEs, the government has become deeply involved with indigenous peoples' interaction with the outsiders. In Taiwan's context, indigenous peoples are trying to gradually become independent from the paternalistic government and to enhance their own power to negotiate with the potential

[43] WIPO, 'Documentation of Traditional Knowledge and Traditional Cultural Expressions, Background Paper (WIPO/TK/MCT/11/INF/7)' (2011) 18.

users, with different tribes, and with the modern state. For Taiwan, as a country which consists of diverse ethnic and culture groups, the launch of strong national examination and control should be done carefully, because it may diminish local peoples' ability of self-interpretation of their culture and self-government.

Therefore, in Taiwan, indigenous peoples rather than potential users applying for registration can be maintained. However, the registration system has to be improved in order to respond to the recommendations of CBD and WIPO mentioned above, the principle of indigenous peoples' parallel sovereignty, and the hybrid characteristics of TCEs. The proposal to amend the legal process of registration in the Protection Act will follow the following principles.

Firstly, the design of registration should consider the colonial past and the enforcement of indigenous peoples' self-determination, so the review process should be designed as the negotiation platform of two parallel sovereignties. If the government unlimitedly delays its review process, indigenous peoples should have the right to push forward the process. Secondly, the extent of the government's examination should not be too intensive, because the registration process should not place disproportionate burdens on indigenous peoples, and the registration office cannot be more knowledgeable than the owner of TCEs.

Thirdly, registration is a way for indigenous peoples to negotiate their sovereignty and memory with the modern state, so the government, as one party of the 'new

partnership',[44] should only conduct the minimum level of review and examination: this should also have the effect of increasing the pace of the review process of registration, solving the inefficiency problem of the administrative process.

Finally, the registration brings about the legal confirmation of TCEs in the modern state's system. However, as TCEs may be varied throughout time, the possibility of revising and supplementing the content of registration should also be carefully considered. As Bhabha argues, 'We must always keep open a supplementary space for the articulation of cultural knowledges that are adjacent and adjunct but not necessarily accumulative, teleological or dialectical.'[45]

In the next section, the minimum examinations model is proposed. This model can also provide some insights into WIPO's continuous discussions about the appropriate degree of examination and the function of the registration office: 'It also has to be determined to what extent and for what purposes applications are examined by the registration office: is the examination purely superficial or does it comprise a substantive aspect? Likewise, how is the validity and authenticity of applications for registration tested?'[46] I believe, at least in Taiwan's context, the minimum model can enforce ***sui generis*** **rights as indigenous peoples' parallel sovereignty** and improve the inefficient examination

[44] Office of the President, Taiwan, 'President Participated in the Ceremony of Reconfirmation of 'A New Partnership Between the Indigenous Peoples and the Government of Taiwan'(總統參加原住民族與台灣政府新夥伴關係再肯認儀式)' (19 October 2002) <http://www.president.gov.tw/Default.aspx?tabid=131&itemid=1011> accessed 8 August 2018.

[45] Homi K Bhabha, *The Location of Culture* (Routledge 1994) 313.

[46] WIPO (n 43) 18.

process, which has become the main obstacle to indigenous peoples' negotiation with the state and outsiders.

8.2.3 Minimum Examination Model

Based on the principles discussed in the last section, minimising the extent of examination of the Council of the Indigenous Peoples can satisfy the postcolonial meaning of *sui generis* rights: recognition of indigenous peoples' parallel sovereignty. In addition, from the experience of the Council of Indigenous Peoples from 2015 to date, qualified examiners have been very hard to find. It is not like a patent's examination, for which experts can be chosen from different professions – no one can be expert at reviewing the living culture of indigenous peoples. In fact, the experts are the applicants themselves, but they cannot be the examiners. Walis Perin, the representative of the *Seediq* people in the application of TCEs, points out the problem of the examiners from his experience of filing application: 'It was not appropriate that the examiners questioned our culture based on their "profession". The examination of TCEs in the process of application should respect our knowledge. The examiners can review if there is any other tribe that may claim the TCE in our application belong to them, but they should not use their profession of music or other subjects to comment our traditional creations.'[47] Walis Perin's comment matches the proposed principles of the minimum examination.

[47] TITV, 'The Council of Indigenous Peoples responded to the Criticism about the Inefficiency of the Protection Act (原創條例不彰遭疑行政怠惰 原民會回應)' (*TITV*, 24 February 2016) <http://titv.ipcf.org.tw/news-19133> accessed 8 April 2018.

In the minimum examination model, the Council of Indigenous Peoples and the examiners invited by the Council of Indigenous Peoples can review whether the application meets the formalities requirements. In addition, they may also carry out a minimum substantive examination to determine if the applied TCE is obviously not owned by the applicants. The following is a detailed suggestion for revising the Protection Act, including approval after formalities examination, deemed approval after exceeding the period of formalities examination, extra care for notification to all indigenous tribes regarding the approval of registration, and the platform of solving indigenous people's opposition to the approval.

(1) Formalities Examination

The registration systems of TK in Portugal[48] and Peru[49] have adopted a formalities examination to approve registration.[50] For example, Article 21 of Peru Law 27811 prescribes that once the competent authority has satisfied itself that the application

[48] See: Portugal: Decree-Law No. 118/2002 of 20 April (Autochthonous Plant Material)' <http://www.wipo.int/wipolex/en/details.jsp?id=5758> accessed 17 September 2018.

[49] See: 'Peru: Law No. 27811 of July 24 2002, Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources' <http://www.wipo.int/wipolex/en/details.jsp?id=3420> accessed 17 September 2018.

[50] WIPO, 'Elements of a Sui Generis System for the Protection of Traditional Knowledge WIPO/GRTKF/IC/4/8' (2002) 29.

contains all the data specified in Article 20,[51] it shall proceed to register the collective knowledge in question.[52]

In addition, Taiwan has its local experience of a formalities examination model. Taiwan adopts the system of granting utility model patent[53] upon completion of the formalities examinations, so the approval of registering TCEs after a formalities examination is not creating a new legal mechanism in Taiwan. The utility model patent granted after the formalities examination is based on Article 99 of Taiwan's Patent Act, 'Where the utility model claimed in a patent application is considered, after formality examination, not under any of the conditions of non-patentability set out in Article 97 hereof, said utility

[51] Article 20 of Peru Law 27811 prescribes the data that an application shall contains:

'Applications for the registration of collective knowledge of indigenous peoples shall be filed with INDECOPI through the representative organizations of the said peoples, and shall contain the following:

(a) Identity of the indigenous people applying for registration of its knowledge;

(b) Identity of the representative;

(c) Designation of the biological resource to which the collective knowledge

relates, it being possible to use the indigenous name;

(d) A mention of the use or uses that are made of the biological resource concerned;

(e) A clear and full description of the collective knowledge to be registered;

(f) The instrument embodying the agreement of the indigenous people to the registration of the knowledge.

[52] Article 21 of Peru Law No. 27811: 'INDECOPI shall satisfy itself, within a period of ten days after the filing of the application, that the said application contains all the data specified in the foregoing Article. Where anything has been omitted, the indigenous people applying for registration shall be served notice to complete the application within a period of six months, which period may be renewed at its request, with a warning that otherwise the application shall be declared abandoned. Once INDECOPI has satisfied itself that the application contains all the data specified in the foregoing Article, it shall proceed to register the collective knowledge in question.'

[53] Article 93 of Taiwan's Patent Act, 'The term "utility model" shall refer to any creation of technical concepts by utilizing the acts of nature, in respect of the form, construction or installation of an article.'

model shall be granted a patent, and the claims and the drawings of the application therewith shall be published.' Article 97 prescribes the formalities requirement: 'Where a utility model claimed in a patent application is considered, after the formality examination, to be under any of the following circumstances, a disapproval decision shall be made.' According to the same Article, the circumstances includes: (1) Where the utility model is not related to the form, construction or installation; (2) Where the new utility is detrimental to public order, good custom or public health; (3) Where the manner of disclosing the utility model is contrary to the requirements that the specification shall contain the title of invention, description of invention, abstract of invention, and scope of claims; (4) Where the utility model is in violation of the principle that an application for a patent for invention shall be limited to one invention; (5) Where certain essential matters have not been disclosed in the specification or drawings, or the essential matters disclosed therein are obviously unclear.

Borrowing from the requirements and procedures relevant to the formalities examination of utility model patent applications, the requirements relating to the formalities examination of TCEs can adopt similar standards. This could be set out as follows. In consideration of the characteristics of TCEs and the rules of the Protection Act, the Council of Indigenous Peoples shall reject the application when: (1) the subject matter is not relevant to traditional religious ceremonies, music, dance, songs, sculptures, weaving, patterns, clothing, folk crafts or any other expression of the cultural achievements of indigenous peoples as defined in Article 3 of the Protection Act. (2) the application does not contain the written application, the specification, necessary graphics, images and related documents prescribed in Article 6, paragraph 1 of the Protection Act,

(3) the application does not indicate the representative, or the representative is not the member of the applicants,[54] (4) the application does not disclose certain essential matters in the specification, drawings or related documents.

(2) The Limited Period of Formalities Examination

The limited period of formalities examination could also be added in the Protection Act. Responding to the impossibility of indigenous peoples suing the Council of Indigenous Peoples in the court, and emphasising the government's responsibility of carrying on the process, the applications shall be deemed approved if the Council of Indigenous Peoples fails to make its decision within a limited period of formalities examination. Considering that the formal examination does not deal with the substantive evaluation of TCEs, the period of formal examination should not exceed six months.

(3) Public Notice of Applications and Special Notice to Indigenous Tribes

After the formalities examination is complete, the Council of Indigenous Peoples must inform the public about the approved application. The public notice shall not only be posted in the government gazette and on the internet as the current Protection Act requests,[55] but also the Council of Indigenous Peoples shall take extra care to inform the

[54] The requirement of representative is based on Article 6, paragraph 2 of the Protection Act, 'The applicant… is limited to aboriginal groups or tribes and a representative shall be elected to take care of all matters arising. The regulations of electing representatives shall be determined by the competent authority.'

[55] Article 9, Paragraph 2 of the Protection Act; 'Any creation recognized as an intellectual creation by the competent authority according to Article 7 and approved for registration shall be published in the government gazette and made public on the Internet.'

indigenous tribes and peoples. The notice by the Council of Indigenous Peoples to indigenous peoples should not be a difficult task, because the Council of Indigenous Peoples and local government have their own methods of informing indigenous peoples: they have controlled indigenous people's personal information in the administrative process related to the government's recognition of the indigenous individual, the indigenous tribe and the indigenous people. The local government in charge of social welfare affairs and the local census office in charge of the registration of indigenous people's legal status are also the agencies for effective notification to indigenous peoples.

An effective notification system can guarantee the accuracy and the reliability of indigenous peoples' applications, because the applicant knows that a faulty application will soon be acknowledged and challenged by other tribes.

(4) Challenging Approved Applications

After being informed, an indigenous tribe or people who claim to be the owner of the applied TCE should have the right to file in opposition[56] to the Council of Indigenous

[56] The right to opposition should be the exclusive rights of indigenous peoples. The current Protection Act has not granted non-indigenous people to oppose the decision of the Council of Indigenous Peoples because the platform the Protection Act provided is between the modern state and indigenous peoples. Non-indigenous people may use the ordinary legal procedure to object the registration of the Council of Indigenous Peoples. If non-indigenous persons claim that the grant of exclusive rights is illegal or improper and such grant has damaged their rights, they can file the administrative petition according to Article 1 of the Administrative Appeal Act: 'Anyone whose right or interest was unlawfully or improperly damaged by a central or local government agency's administrative action is entitled to file an administrative appeal according to this Act, provided that other Acts stipulated otherwise.'

Peoples, and if the opposition is accepted, the *sui generis* right granted to the registered holder will be withdrawn.

However, how does the Council of Indigenous Peoples accept or reject the opposition? Borrowing from the Pacific Model Law, this thesis suggests that it should provide two ways to solve the disputes about the ownership of TCEs. Both parties may choose for the review committees organised by the Council of Indigenous Peoples to perform a substantive review, or they may solve the dispute according to the customary laws agreed by the applicant and the opponent. If both parties agree to use the former way, the review committee will carry out a substantive review of the application. If both parties choose the latter way, the Council of Indigenous Peoples should function as the Cultural Authority in Article 18 (1) of the Pacific Model Law: 'If…there is a dispute about ownership, the Cultural Authority must refer the matter to the persons concerned to be resolved according to customary law and practice or such other means as are agreed to by the parties.' If the dispute is resolved, Article 18 (2) of the Pacific Model Law can also be adopted: 'When all of the traditional owners have been identified in accordance with customary law and practice or such means as have been agreed to, the traditional owners must advise the Cultural Authority, and the Cultural Authority must make a written determination containing such details as to identify the traditional owners.'

(5) Amending or Supplementing Registration

Finally, the applicant should be allowed to amend or supplement the claim of registered TCEs in consideration of the hybrid characteristics of TCEs. The multi-version TCEs in the

applications have been accepted, as discussed in Section 7.3, so a revision of the claim of TCEs should also be allowed after registration, if the application of revising or supplementing claims of TCEs can be approved in the minimum examination process mentioned above.

8.3 Summary

This chapter examines how the efficiency of governmental review influences the tribe's cultural life and suggests revisions of the Protection Act. The minimum examination model is proposed to rebuild the registration system as a dialogue platform, which can recognise indigenous peoples' parallel sovereignty and enforce the real *sui generis* rights.

The minimum examination model proposed here borrows from other countries' experience and regional laws, considers the local IP practice of Taiwan, and invites the involvement of customary laws and tribal dispute platform. The cross-reference of international, regional and domestic laws and local customs should be a better way of considering the granting of the right of TCEs and guaranteeing indigenous peoples' sovereignty and their negotiating power with the government.

Conclusion

IP is not only economic but political. It is related to struggles of cultural identity and sovereignty. Part 2 analyses the colonial background of IP law, the modern state, and registration. However, it does not suggest that the colonial power performed in these institutions has totally dominated indigenous peoples. Drawing upon postcolonial theory as well, this thesis contends that TCEs are hybridity and indigenous peoples can negotiate and translate their cultures in the registration system. Three main arguments are proposed in this thesis:

Firstly, recognising the colonial background of IP law, developing countries' and indigenous peoples' requirement for legal protection of TCEs is an opportunity to balance IP, which is based on the Western idea of property and authorship, with more diverse cultures and social justice. *Sui generis* rights should recognise indigenous peoples' parallel sovereignty and encourage more bottom-up methods to consider the legal protection of TCEs. Chapters 2 and 5 explore the interactions between conventional IP, the Protection Act and Taiwanese indigenous peoples.

Secondly, this thesis recognises the colonial relationship between the modern state and indigenous peoples, but also confirms indigenous peoples' ability to negotiate with the modern state by observing their actions during their registration of TCEs. Chapter 3 uses Taiwan as an example to explore the dilemma the state may face in the official recognition of indigenous peoples, tribes and tribal meetings, the codification of customary law and the institution of representatives. Chapter 6 points out indigenous peoples' power and

willingness to negotiate and explores how the Protection Act and indigenous peoples deal with the state's dilemma.

Thirdly, this thesis recognises the colonial history of registration and the risk of changing indigenous peoples' memory and oral tradition through registration, as described in Chapter 4. However, it argues that indigenous peoples' positive position of documenting their own culture in official registers will reconstruct registration beyond a legal institution of granting rights of TCEs. Chapter 7 finds that in the age of the decline of oral tradition, indigenous peoples' registration of TCEs, as an *in-between* site of memory, partly replaces the function of the *in-between* storyteller. It explores Taiwanese indigenous peoples' examples, especially seven registered TCEs, to confirm the dynamic progress of registration.

Of course, the registration system is still far from perfect. In order to secure *sui generis* rights as indigenous peoples' parallel sovereignty, suggestions for amending the legal system of registration are proposed in the final chapter (Chapter 8).

Through claiming their rights of TCEs in the modern state's legal system, indigenous peoples are inevitably inserted into the road to mainstream culture, as Spivak puts it in her analysis of the subaltern's connection to the modern state's institution:

> When a line of communication is established between a member of subaltern groups and the circuits of citizenship or institutionality, the subaltern has been inserted into the long road to hegemony. Unless we want to be romantic purists

> or primitivists about "preserving subalternity''—a contradiction in terms—this is absolutely to be desired. (It goes without saying that museumized or curricularized access to ethnic origin—another battle that must be fought—is not identical with preserving subalternity.) Remembering this allows us to take pride in our work…[1]

Indeed, in the process of indigenous people claiming their legal rights, the shadows of colonialism still influence the legal process and should be battled or negotiated with, but this is not an excuse to stop pursing their rights and sovereignty. Indigenous peoples' culture does not need to be isolated from mainstream cultures or be preserved as a pure aboriginality. It should also be noted that indigenous peoples' hybridity is not their surrender to mainstream culture, but their power to negotiate with it.

Finally, it has been argued in this thesis that the Protection Act and *sui generis* rights are based on the idea of indigenous peoples' parallel sovereignty, but indigenous peoples' sovereignty cannot be merely supported by the legal recognition of TCEs. Indigenous peoples' practice of informed consent, land rights, political participation, and conflicts and conciliation between economic development and environmental protection are all important issues for achieving indigenous peoples' sovereignty. It is a long way to go, but it is absolutely to be desired.

[1] Spivak (n 40) 310.

Appendix

The Protection Act for the Traditional Intellectual Creations of Indigenous Peoples[1]

Article 1 (Legislative Purpose)

In order to protect the traditional intellectual creations of indigenous peoples (hereinafter referred to as "Intellectual Creations"), and to promote the cultural development of indigenous peoples, this Act is set forth according to Article 13 of The Indigenous Peoples Basic Law.

Article 2 (Competent Authority)

The competent authority referred to herein shall mean the Council of Indigenous Peoples.

Article 3 (Definition of Intellectual Creations)

The intellectual creations referred to in this Act shall mean traditional religious ceremonies, music, dance, songs, sculptures, weaving, patterns, clothing, folk crafts or any other expression of the cultural achievements of indigenous peoples.

Article 4 (Recognition Registration)

Intellectual creations shall be recognized by and registered with the competent authority so as to be protected by the Act. The criteria for recognizing intellectual creations mentioned in the previous paragraph shall be determined by the competent authority.

Article 5 (Recruitment of Personnel)

The competent authority shall recruit (assign) personnel of related institutions, specialists, scholars and aboriginal representatives to undertake the recognition of

[1] The English version of the Protection Act is provided by: 'Laws & Regulations Database of The Republic of China (Taiwan)' <https://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=D0130021> accessed 17 September 2018.

intellectual creations in addition to any matters stipulated in other regulations. At least 50% of these personnel shall be drawn from aboriginal representatives.

Article 6 (Documents Required for Registration Application and Selection of Representatives)

The applicant for any intellectual creation shall provide a written application, a specification, necessary graphics, images and related documents or provide audio-visual creations in order to apply for registration with the competent authority.

The applicant mentioned in the previous paragraph is limited to aboriginal groups or tribes and a representative shall be elected to take care of all matters arising. The regulations of electing representatives shall be determined by the competent authority.

Article 7 (Obtaining Exclusive Rights to Use Intellectual Creations)

Upon being recognized as intellectual creations, the exclusive right to use such intellectual creations shall be obtained according to the following rules:

1. Once the applicant is confirmed to be the owner of an intellectual creation, registration shall be approved. And starting from the date of registration, the applicant shall obtain the exclusive right to use such intellectual creations.

2. If an intellectual creation is confirmed to belong to the applicant and other specific aboriginal groups or tribes, the applicant and other specific aboriginal groups or tribes shall jointly obtain the exclusive right to use the intellectual creation starting from the date of registration.

3. If an intellectual creation cannot be confirmed to belong to any specific aboriginal group or tribe, the rights shall be registered under the entire indigenous peoples. The entire indigenous peoples will obtain the exclusive right to use such intellectual creation starting from the date of registration.

Article 8 (Registration Modification)

In the event of change to the name of the owner of an exclusive right to use intellectual creations, application to modify registration is required.

Article 9 (Notification of Intellectual Creations and the Issuance of Certificates and Certification Marks)

For intellectual creations, registries shall be established by the competent authority and notices shall be issued.

Any creation recognized as an intellectual creation by the competent authority according to Article 7 and approved for registration shall be published in the government gazette and made public on the Internet.

The competent authority shall issue an intellectual creation exclusive user certificate and certification marks.

The regulations of application and registration of intellectual creations, issuance, reissuance, annulment, and grant of certification marks, cancellation and revocation shall be decided by the competent authority.

Article 10 (Definition of the Exclusive Right to Use Intellectual Creations)

The exclusive right to use intellectual creations shall mean the property rights and moral rights of intellectual creations.

The owner of an exclusive right to use intellectual creations enjoys the following moral rights of intellectual creations:

1. the moral right to publicly release the work.

2. the moral right to indicate the name of the exclusive user.

3. the moral right to prohibit others from distorting, mutilating, modifying, or otherwise changing the content, form, or name of the work, thereby violating the author's reputation.

The owner of the exclusive right to use intellectual creations shall exclusively use and profit from the property rights of such intellectual creations on behalf of specific ethnic groups, tribes or the entire indigenous peoples, unless otherwise stipulated by law or agreement, and shall exercise the rights mentioned in the previous paragraph.

Indigenous people themselves are entitled to use and profit from the intellectual creations of ethnic groups, tribes or the entire indigenous peoples and shall not be subject to the limitations stipulated in Article 14.

Article 11 (The exclusive right to use intellectual creations shall not be assigned, mortgaged or be a target of compulsory execution)

The exclusive right to use intellectual creations shall not be assigned, mortgaged or be a target of compulsory execution.

Article 12 (Title to the Exclusive Right to Use Intellectual Creations)

The exclusive right to use intellectual creations shall not be given up unless with the consent of the competent authority; exclusive rights to use intellectual creations that are given up shall be transferred to the entire group of indigenous peoples.

Article 13 (License of Exclusive Right to Use Intellectual Creations and the Effectiveness Thereof)

An owner of an exclusive right to use intellectual creations can license others to use such creations; the territory, time, content, method of use or other matters pertaining to the license shall be decided according to an agreement between and among the interested parties; portions that are not clearly set forth shall not be considered as part of a license.

Any exclusive license of the property rights of intellectual creations shall be signed by the concerned parties and be submitted to the competent authority, along with agreements or documents of proof, to apply for registration. No right shall become effective unless registered.

Any initial license will not be affected by further license of the property rights of intellectual creations by the intellectual property rights owners.

Non-exclusive licensees shall not sublicense the rights licensed thereto to any third party unless with the rights owner's consent.

An exclusive licensee can exercise its rights as a rights owner within the scope authorized by the rights owner. The owner of the exclusive right to use intellectual creations and the indigenous peoples themselves cannot exercise such rights within the scope of the license.

Article 14 (Income from the Exclusive Right to Use Intellectual Creations and the Utilization Thereof)

If the exclusive right to use any intellectual property is obtained by an aboriginal group or tribe according to the provisions in Article 7, subparagraph 1 or subparagraph 2 herein, the income derived there from shall be used to set up a mutual fund benefiting the relevant aboriginal groups or tribes; the income, expenses, method of custody and utilization in connection thereto shall be determined separately by the competent authority.

If the exclusive right to use intellectual creations is obtained by the indigenous peoples in their entirety, the income derived there from shall be included in the consolidated development fund of the indigenous peoples and be utilized for the purpose of promoting the cultural development of aboriginal groups or tribes.

Article 15 (Permanent Protection of the Exclusive Right to Use Intellectual Creations)

The exclusive right to use intellectual creations shall be protected permanently.

If the exclusive user of intellectual creations ceases to exist, the protection of the exclusive right thereof shall be deemed to have survived; the exclusive right to use shall instead belong to the entire indigenous peoples.

Article 16 (Situations in Which Already Published Intellectual Creations Can be Used)

In the event of any of the following, published intellectual creations can be used:

1. For non-profit use by individuals or families.

2. For uses required for reporting, criticism, education or research.

3. fair use for other justified purposes.

Any use as mentioned in the previous paragraph should credit the source. However, such limitation does not apply if the purpose and method of use is unlikely to infringe on the rights of exclusive users and is not in violation of customary practices in society.

Article 17 (Remedy for Infringement on the Exclusive Right to Use Intellectual Creations)

An exclusive user of an intellectual creation may demand removal of infringement of its rights. Where there is likelihood of infringement, a demand may be made to prevent such infringement.

Article 18 (Damage Compensation Liability)

Parties infringing on the exclusive right of intellectual creations willfully or negligently shall be liable for damage compensation. When there is more than one infringer, all infringers shall be held jointly and severally liable.

The right to make claims as mentioned in the previous paragraph shall be terminated if not exercised within two years after learning of the existence of parties liable for damages and compensation. The same shall apply if not exercised within ten (10) years of infringement.

Article 19 (Method of Calculating Damage Compensation)

When making a claim for damage compensation, the infringed party can calculate damages according to any one of the following methods of calculation:

1. Making claim in accordance with the provisions of Article 216 of the Civil Code ; provided, when the the infringed party is unable to prove damages, its damages can be the difference between the expected profits that can generally be obtained and the profits that can be obtained from exercising the same intellectual creation right after infringement.

2. Claim for the profits of infringers gained through infringement ; provided, when the infringer is unable to prove its cost or necessary expenses, the total revenue derived from the infringement shall be deemed to be its benefit. According to the provision in the previous paragraph, if it is difficult for the infringed party to prove the actual damages incurred thereby, the infringed party can request the courts to grant damage compensation in an amount no less than Fifty Thousand New Taiwan Dollars (NT$50,000) and no more than Three Million New Taiwan Dollars (NT$3,000,000) based on the degree of infringement. If the damaging activity was intentional and the matter serious, the compensation may be increased to Six Million New Taiwan Dollars.

Article 20 (Method of Disposal in the Event of Damage to the Exclusive Right to Use of Intellectual Creations)

In the event of infringement on the exclusive right to use of intellectual creations, the infringed party can request to destroy the infringing articles or undertake other necessary disposition while demanding to publish part or all of the judgment in a newspaper with the fees thereof being borne by the infringing party.

Article 21 (Protection of Intellectual Creations of Foreigners)

If there exists any intellectual creation protection treaties or agreements between the government of the Republic of China and foreign governments, such treaties or agreements shall be followed.

Article 22 (The rights obtained hereunder shall not affect the rights obtained by the exclusive right to use intellectual creations or by a third party in accordance with other laws)

The provisions herein do not affect the rights obtained by an exclusive user of intellectual creations or by a third party in accordance with other laws.

Article 23 (Effective Date)

This Act shall become effective on the date of promulgation.

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